

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
SAN FRANCISCO DIVISION OF JUDGES**

THE COMMERCIAL LINEN EXCHANGE,  
A DIVISION OF THE SODEXHO CORPORATION

and

Cases 28-CA-18708  
28-CA-18807  
28-CA-18948

UNION OF NEEDLETRADES, INDUSTRIAL  
AND TEXTILE EMPLOYEES, AFL-CIO, CLC  
(UNITE)

THE COMMERCIAL LINEN EXCHANGE,  
A DIVISION OF THE SODEXHO CORPORATION

and

Case 28-RC-6175

UNION OF NEEDLETRADES, INDUSTRIAL  
AND TEXTILE EMPLOYEES, AFL-CIO,CLC  
(UNITE)

Paul Irving and William Mabry III, Attys.,  
Counsel for the General Counsel,  
Phoenix, Arizona.

Barry S. Jellison, Atty., Council for the  
Charging Party, San Francisco, California

Robert Deeney, Donald Gilbert, Alec Hillbo, and  
Tom Kennedy, Attys., Counsel for Respondent,  
Phoenix, Arizona.

**DECISION AND RECOMMENDATION ON OBJECTIONS**

**Statement of the Case**

Lana H. Parke, Administrative Law Judge. This matter was tried in Phoenix, Arizona during 18 days of October and November 2003<sup>1</sup> upon an Order Consolidating Cases, Directing Hearing on Objections to Conduct Affecting the Election issued August 11 and an Order Further Consolidating Cases, Amended Second Consolidated Complaint and Notice of hearing (the complaint) issued September 19 by the Regional Director of Region 28 of the National Labor Relations Board (the Board) based upon charges filed by the Union of Needletrades, Industrial and Textile Employees, AFL-CIO, CLC (UNITE), herein the Union or Petitioner. The complaint alleges The Commercial Linen Exchange, A Division of the Sodexho Corporation (Respondent)

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<sup>1</sup> All dates herein are 2003 unless otherwise specified.

engaged in conduct violating the National Labor Relations Act (the Act).<sup>2</sup> Objections to Conduct Affecting the Results of the Election, filed by Petitioner on June 4 are, in part, coextensive with the complaint allegations. Respondent essentially has denied all allegations of unlawful conduct and conduct affecting the results of the election. The General Counsel seeks, as a remedy to the alleged violations, a bargaining order under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

## ISSUES

1. Did Respondent violate Section 8(a)(1) of the Act by engaging in surveillance of employees' union activities, threatening employees with unspecified reprisals, interrogating employees about their union membership, activities, and sympathies, threatening employees by informing them it viewed their activities as a personal attack, threatening it would engage in dilatory bargaining, threatening employees with loss of benefits, improperly involving itself in union authorization card revocation, threatening employees with discharge, providing food, beverages, company shirts and hats to employees because they voted against the Union and in order to persuade them from supporting the Union, informing employees that food and drink were supplied because employees voted against the Union, thanking employees for voting against the Union, inviting employees to seek alternate employment if they did not like working in a non-union environment, promising employees a salary increase, improved drinking water, improved job security, and other unspecified benefits as a result of their having voted against the Union, upgrading its drinking water and cooling systems and changing its safety glove distribution, in order to dissuade employees from supporting the Union, promulgating an overly-broad and discriminatory no-solicitation rule by prohibiting employees from speaking with other employees about the Union or about working conditions, pressuring employees to, and assisting employees in, preparing requests to revoke their authorization cards, informing employees that salary increases would be frozen during collective-bargaining, telling employees they could not get improved health insurance through collective-bargaining, and threatening employees with plant closure if they selected the Union?
2. Did employees Isabel Avena (Ms. Avena), Elena Espinoza (Ms. Espinoza), Maria Ramirez (Ms. Ramirez),<sup>3</sup> Jesus Zarate (Mr. Zarate), and Sandra Gonzalez (Ms. Gonzalez) engage in a strike of Respondent on May 1?
3. Did Ms. Avena, Ms. Ramirez, Mr. Zarate, and Ms. Gonzalez make unconditional offers to return to their former positions of employment on May 1?
4. Did Respondent unlawfully fail and refuse to reinstate Ms. Avena, Ms. Ramirez, and Mr. Zarate to their former positions of employment?
5. Did Respondent unlawfully discharge Ms. Avena, Ms. Ramirez, and Mr. Zarate?
6. Did Respondent, on May 2, unlawfully issue written discipline to Ms. Espinoza?

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<sup>2</sup> At the hearing Counsel for the General Counsel amended the complaint to include additional 8(a)(1) allegations that Respondent coerced employees to revoke authorization cards, threatened employees that salary increases would be frozen and that employees could not get improved health insurance during and through any collective-bargaining, threatened employees with plant closure if they selected the Union as their representative, and interrogated employees. Counsel for the General Counsel also amended the complaint to allege Rudolfo "Rudy" Contreras, Nicolas G. Galarza, Elaizar Rodriguez Valdez, and Luis Madrigal as agents of Respondent. Respondent denied all amended allegations.

<sup>3</sup> Ms. Ramirez, whose full name is Maria Argelia Gomez Ramirez testified under the name Maria Argelia Gomez.



\$50,000 directly from points outside the State of Arizona. Respondent admits, and I find, it has at all material times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.<sup>5</sup>

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## II. Alleged Unfair Labor Practices

### A. The Union Organizing Campaign

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The Union commenced its organizing campaign among Respondent's employees on about April 24 followed by a meeting of several employees at a local Days Inn. Meredith Stewart (Ms. Stewart), organizer for the Union's industrial laundry division, headed the campaign; other union organizers included Daisy Pitkin (Ms. Pitkin) and Fernando Bribriezca (Mr. Bribriezca). Thereafter, union representatives along with employee supporters held additional employee meetings, talked of the Union and distributed union campaign flyers to employees at the plant, made house calls to employees to encourage union support, and obtained signed authorization cards.

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In late April, union representatives and supporters painted in Spanish the message "Yes we can, now or never, UNITE" on a twin bed-sheet sized banner (the banner). The Banner figured in employee solicitation meetings and an employee demonstration described below. On April 30, the Union filed a representation petition with Region 28 seeking certification in a unit of all full and regular parttime production, maintenance, shipping, and receiving employees.

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On May 1, union representatives and about 30 employee supporters met at a park near the facility. The group drafted a list of work issues to present to Terry Lomax (Mr. Lomax), plant manager. The one-page list of demands was written in Spanish and English (the petition), the English version of which read:

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**We, the Sodexho (Commercial Linen Exchange) workers, demand of our Employers**

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- **Respect on the Job!**
- **A More Just Salary!**
- **Affordable Family Health Insurance!**
- **Safer Working Conditions!**
- **An End to Production Pressure!**
- **An End to Favoritism!**

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**We will see you at the Negotiating Table!!**

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**UNITE!**

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<sup>5</sup> Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, and/or unchallenged credible evidence.

A group of employees (the demonstrators), planned to carry the banner and copies of the petition to the plant at about 2 p.m. just before shift change, blowing whistles as they walked through the hallway of the facility to alert coworkers to rally to the cause. Employees at work who wished to show their support would join the demonstrators. The demonstrators *en masse* would present the petition to Mr. Lomax in his office. The employee demonstration and petition presentation are described hereafter.

On May 6, the Regional Director approved the parties' Stipulated Election Agreement. An election by secret ballot was conducted among Respondent's employees on May 29. A majority of Respondent's employees voted against union representation.

## **B. Alleged Independent Violations of Section 8(a)(1) of the Act**

### **1. Alleged Surveillance and Threat of Reprisal**

The plant is located in a "rough area of town." About 2 a.m., April 28, several union representatives and a number of employees gathered outside the plant at a picnic table located just beyond Respondent's property line and about 40 feet away from a door where employees commonly exited the plant. The group displayed the banner and waited for second shift employees to exit the plant. Between 2:00 and 2:30 a.m., two off-duty employees in the group, Mr. Gaitan and Alberto Castro (Mr. Castro), carrying union literature, went into the plant to use the restroom. When the two left the plant, Connie Noble (Ms. Noble), production manager, joined them and asked what was going on. Mr. Gaitan told her they were organizing a union and waiting to see employees at shift change. Ms. Noble asked to see what the papers they carried. Either Mr. Gaitan or Mr. Castro gave her copies.<sup>6</sup>

Mr. Gaitan and Mr. Castro rejoined the group at the picnic table. During this time, Ms. Noble stood near the windows and doors of the plant looking out at the group. Later, after about 30 to 35 employees had gathered around the picnic table, Ms. Noble and Rudy Contreras (Mr. Contreras), leadman, came from the plant toward the table. Mr. Briebiezca asked Ms. Noble if he could do anything for her. Ms. Noble said, "I'm just here to see who's here." The two then withdrew, and the union representatives and supporters continued speaking with employees. Mr. Briebiezca testified he saw Ms. Noble standing between two buildings making "some type of writing motion." Visibility was reduced as it was "really early in the morning," and still dark outside, but Mr. Briebiezca inferred Ms. Noble wrote down the names of employees gathering with union representatives. The evidence is insufficient to permit me to adopt such an inference.

### **2. Alleged Threat of Discharge**

On May 1, an employee in-plant, prounion demonstration (the demonstration, described below) occurred just at the 2 p.m. quitting time of production employee, Elena Espinoza (Ms. Espinoza). Ms. Espinoza turned off her machine and joined the demonstrators. She and demonstrator Anamaria Caranza (Ms. Caranza) testified that after Mr. Gaitan tried to present a

<sup>6</sup> Ms. Noble denied seeing Mr. Gaitan at all that evening; she said Mr. Castro gave her copies of a union flyer and card. Although Mr. Gaitan denied giving Ms. Noble copies of the literature, saying she took it from Mr. Castro without permission, his Board affidavit states, "I gave her one of each thing." His affidavit account unfavorably impacts his testimony concerning this confrontation, and I conclude the General Counsel has not proven that Ms. Noble "grabbed" any union literature from any employee.

petition to Mr. Lomax (as described below), Mr. Lomax spoke to employees through a translator, Ms. Espinoza said he told employees, "There's going to be no work." According to Ms. Caranza, he said those involved in the demonstration would be fired. Ms. Espinoza understands a little English but relied primarily on the translation and coworker reports of what Mr. Lomax said. Ms. Espinoza and Ms. Caranza's testimony regarding Mr. Lomax's statements on that occasion was such an amalgam of dubious coworker reports and inferences that I cannot give it weight.

### 3. Informing Employees That Union Activities Were Viewed as a Personal Affront

Between April 30 and about May 19, Respondent held meetings with small groups of employees and showed them an antiunion video (video meetings).<sup>7</sup> At a video meeting on May 1, following the demonstration, Mr. Lomax and Sonia Soto Garcia (Ms. Garcia),<sup>8</sup> Respondent's human resources manager, met with a group of employees. With Ms. Garcia interpreting, Mr. Lomax said he was saddened and hurt by the employees' conduct, that in his 28 years with the company he had never seen anything like that, and he could not understand why it was happening to him. On later occasions, Mr. Lomax, who admittedly took employees' organizing efforts personally, told employees he was surprised they had reached out to a third party and not to him, that he had always been there for employees.

After reporting to work on May 2, Mr. Lomax and Ms. Garcia met with Ms. Espinoza and issued her a written warning, as described below, for turning off machines during the demonstration. During the meeting, Mr. Lomax said he had not done anything to employees, that it had been just a couple of days since a birthday party had been held for him and asked why employees were doing this.<sup>9</sup>

### 4. Statements Made at Video Presentations

During the video meetings, either before or following the video presentation, Ms. Garcia and/or Mr. Lomax and other managers spoke to employees. Ms. Garcia told employees that during negotiations wages would be frozen, but any wage increase reached pursuant to bargaining would be made retroactive.<sup>10</sup> Mr. Lizarraga testified Ms. Garcia said the Union was not good for the people, all it did was take money; if it came in all benefits would be frozen, and Respondent would not give doughnuts, ice cream, or a Christmas party to employees.<sup>11</sup> However, under cross-examination, Mr. Lizarraga agreed Ms. Garcia had said Respondent would have to negotiate for a contract, the process would take some time, and during

<sup>7</sup> The General Counsel does not allege the video showings to have violated the Act.

<sup>8</sup> Witnesses referred to Ms. Garcia as Sonia Soto. As she prefers Garcia, I have used that name throughout this decision.

<sup>9</sup> Counsel for the General Counsel also infers from Ms. Espinoza's testimony that Ms. Garcia warned her not to go around talking. However, I find the following testimony too convoluted to permit me to draw any such inference:

Ms. Espinoza: She gave me this paper. She said that I wouldn't be going around so that she wouldn't, so that I wouldn't go around having any more problems, so that I wouldn't be going around talking, so I wouldn't have to be doing anything.

<sup>10</sup> Respondent reviews each employee annually. The points achieved on the review dictate employees' wage increases, the maximum of which is four per cent.

<sup>11</sup> Respondent sometimes provided food and drink for special occasions including holidays and to reward safety goal attainment.

negotiations, Respondent could not change benefits and salaries. Other employees testified Ms. Garcia said Respondent could give no raises upon unionization, and Mr. Lomax would prefer to close the plant rather than accept the union. Much of the employee testimony of what was said was based on unwarranted inferences or employee consensus of what was said and not fully reliable. I do not find, therefore, that Ms. Garcia said Respondent would withdraw any

5 benefits upon unionization or that she threatened plant closure.

#### 5. Respondent Involvement in Authorization Card Rescission

10 At some video meetings, after showing the video, Ms. Garcia described the union authorization card as a blank check. She told employees if they wanted information on how to retrieve their authorization cards they should come to her. Beginning after May 1, Respondent posted a paper on its bulletin boards, which advised employees that those who regretted signing union authorization cards could ask the Union to return them, gave instructions on how

15 to do so, and invited employees to see Ms. Garcia for assistance. When requested, Ms. Garcia furnished pre-printed examples of wording employees could use in requesting return of their cards, and some employees completed return requests in her presence. Ms. Garcia collected revocation requests from some employees and gave them to Ms. Grate for forwarding to the Board's regional office or the Union.

#### 20 6. May 10 or 11 Meeting between Mr. Gaitan and Mr. Lomax

In early May, Mr. Gaitan decided to resign from Respondent's employ. He called Mr. Lomax and asked to meet with him. On May 10 or 11, when Mr. Gaitan returned to the plant while off duty, Mr. Lomax asked to speak with him. Mr. Gaitan joined Mr. Lomax, Lupe Figgins (Ms. Figgins, Respondent's comptroller), and Ms. Garcia in the conference room. Mr. Gaitan told them he was planning to resign. According to Mr. Gaitan, Mr. Lomax asked him why he was doing it (referring, Mr. Gaitan supposed, to his union support), saying he was a good worker and that Mr. Lomax had never expected that from him. Mr. Gaitan also testified

25 that Ms. Garcia said the company could not prohibit him from supporting the Union and that Mr. Lomax said, "You know what you're doing; we cannot tell you not to do it." Respondent's witnesses gave extensive testimony regarding this conversation to the effect that Mr. Gaitan offered to support Respondent's antiunion campaign in exchange for money. I do not find it necessary to detail that testimony in light of my credibility determination. In resolving credibility,

30 I have considered witness demeanor. I found Mr. Gaitan generally to be a very credible witness, forthright and sincere. However, I observed his manner altered during his testimony of this meeting. Unlike his manner in giving earlier testimony, he appeared to me to be uncomfortable. Moreover, I note Mr. Gaitan failed to mention the incident when he gave an affidavit to the Board three or four days later, which is inexplicable if the conversation went as related. Therefore, I do not accept Mr. Gaitan's version of this conversation.

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#### 7. Ascribing Discharge of an Employee to Antiunion Animus

45 Employee Juan Uribe Castellanas (Mr. Castellanas) testified that a few days before the election, Ms. Garcia told him she had fired employee Carlos Gonzalez because he supported the Union. No employee by that name has worked for the company. Mr. Castellanas said the employee he knew as Carlos Gonzalez was an open union supporter, lived near him and was, indeed, fired.<sup>12</sup> When asked to recount his conversation with Ms. Garcia in detail,

50 <sup>12</sup> The Region dismissed an 8(a)(3) charge alleging an unlawful discharge of an individual named Carlos Gonzalez.

Mr. Castellanas testified Ms. Garcia came to him in the cafeteria and without preamble announced, "I ran Carlos off." Mr. Castellanas's alleged response, also without explication, was to tell Ms. Garcia he was not going to be intimidated; he was still going to support the Union. Absence of contextual details makes the alleged interchange inherently incongruous.

5 Accordingly, I cannot credit Mr. Castellanas's account of his conversation with Ms. Garcia regarding Respondent's discharge of Carlos Gonzalez or any employee Mr. Castellanas may have known by that name.

#### 8. Events at the May 29 Vote Tally

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Following the election on May 29, the Board conducted a ballot count at the plant attended by representatives of the parties and a number of employees. When the results were announced, Ms. Garcia, in exuberant elation, skipped about the room shaking pom poms and bumped into Leticia Alvarez's eleven-year-old child.<sup>13</sup> According to Ms. Espinoza, Ms. Garcia said employees were to leave, that Respondent was antiunion and was going to fire them. Ms. Espinoza said "they" got the other employees to tell us to leave, to go. On cross-examination, she said "someone" said "they" were running employees off and going to fire them all, that several individuals said that, including secretaries, coworkers, Ms. Garcia, and Mr. Lomax. However, she also testified that she did not hear anything from Ms. Garcia or Mr. Lomax. Ms. Espinoza's Board affidavit is silent regarding such statements. While Ms. Espinoza may have heard threatening statements in the melee following the ballot count, I find her testimony too inconclusive to permit me to charge either Ms. Garcia or Mr. Lomax with the statements.<sup>14</sup>

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#### 9. The Post-Election Celebrations

On May 30, the day following the election, Respondent hosted a series of celebrations in its cafeteria, providing food and drink for all employees during extended paid break periods. According to Ms. Garcia, the celebrations were partly for the outcome of the election and partly to thank employees for putting up with the pressure and tension surrounding the election. The May 30 festivities differed from Respondent's former provision of food and drink for special occasions in the extension of break time.<sup>15</sup> The cafeteria was decorated with balloons and signs that read, variously, "Thank you for voting no," "No to unions," "Thank you. We are United." Secretaries informed participating employees the celebrations were to thank them for voting against the Union, and Ms. Garcia translated supervisor appreciation that employees had not brought in a third party. With Ms. Garcia translating, Mr. Lomax and Ms. Grate spoke to the assembled employees, thanking them for their votes. Ms. Grate said Respondent had obtained several more hospital contracts, which assured abundant future work. In order to meet increased commitments, employees would have to work together as a team. Employees

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<sup>13</sup> There is a dispute as to whether the child fell and/or cried, which I do not find necessary to resolve. There is no evidence the incident was other than an unintentional touching; Ms. Garcia was not disciplined for it.

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<sup>14</sup> Except for the alleged threat of discharge testified to by Ms. Espinoza, which I have not credited, the General Counsel does not contend Ms. Garcia's conduct at the election tally violated the Act. Rather, Counsel for the General Counsel argues Ms. Garcia's conduct and Respondent's failure to discipline her for it evidences disparate treatment in the discharge of Ms. Lozania. That argument is addressed below.

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<sup>15</sup> Witnesses disagreed on the extent to which Respondent provided food and drink to employees, but the evidence as a whole persuades me that Respondent consistently, though infrequently, supplied food and drink on special occasions.

unwilling to do so or who would not be happy like that should leave Respondent's employment. Mr. Lomax circulated among employees thanking them for voting no.<sup>16</sup> Respondent tossed company-embossed hats and visors to employees.

5 Ms. Noble echoed Ms. Grate's teamwork statements in three or four safety meetings conducted by Ms. Noble following the election. She told employees the company was going to get a lot of new work; it was important for employees to work together; whatever went on before the election was behind them, and if employees felt they could not work together, it was time to look for other work.

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#### 10. Post-election Grant of Benefits

Sorting employees complained about the heat and drinking water in their work area. A month or two after the election, Respondent installed a swamp cooler in the plant roof above the sorting area. The swamp cooler had formerly been used to cool an air compressor at the plant but had been unused for the preceding three or four years. Following the election, Respondent also replaced three drinking fountains in the plant area with new ones. Prior to April, employees had been required to use frequently washed protective gloves, which employees disliked believing used gloves furnished inadequate protection. Respondent adduced evidence that prior to its awareness of union activity, it found a competitive vendor to supply reusable gloves, which were inexpensive enough to use as disposable gloves. Beginning in late April, Respondent furnished employees new gloves daily.<sup>17</sup> In years before 2003, Respondent furnished employees with Gatorade or similar flavored drinks during very hot summer days and weeks. Following the election, when the summer heat began in early June, Respondent furnished Gatorade to employees consistently through the summer until Labor Day.

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### C. Alleged Violations of Section 8(a)(3) of the Act

#### 1. May 1: Employee Presentation of Petition and Work Cessation

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On May 1 as previously planned, the demonstrators, about 25-35 employees strong, approached the plant through the driveway just before 2 p.m. They entered the plant through a door at the top of an exterior flight of stairs on the North end of the facility, so-called the

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<sup>16</sup> These findings are a distillation of essentially corroborative testimony from several employees who testified concerning Mr. Lomax and Ms. Grate's statements at the celebrations.

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Ms. Espinoza remembered their saying that for those few people who did not agree with how things were run, it was time to leave. Yolanda Dominguez Pena testified Ms. Grate said if employees were not happy there, they could look for a job elsewhere, but Mr. Lomax only thanked employees. Iris Enriquez said Ms. Grate, through Ms. Garcia, told employees this was now a time for new things, that there was going to be new work coming to the plant. With new work coming, she wanted employees to work united, and if people did not feel they could be happy like that, perhaps now was the time to look elsewhere. Ms. Grate did not mention the Union, and Mr. Lomax only said, "Thank you." Juan Uribe Castellanas, who speaks English, testified Ms. Grate said there would be more work as the company had obtained three more hospital customers, there would be more salaries, water for drinking, and for those employees who did not feel they could unite and work together, who did not like the work, they could go find another job.

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<sup>17</sup> Because employee testimony was inconsistent and unclear as to when the glove change occurred, I accept Respondent's evidence that its glove distribution practice was in the process of being changed before it learned of its employees' union activity.

emergency door through which employees customarily entered and exited. Mr. Gaitan headed the group and carried the petitions. Ms. Lozania and Guillermo Morales (Mr. Morales) followed behind carrying the banner, inscribed with red lettering "WE WANT A UNION YES IT CAN BE DONE."<sup>18</sup> After passing through the emergency door, the demonstrators, some of whom  
 5 possessed whistles, walked along a production hallway toward the office area. When Ms. Garcia encountered the demonstrators coming along the hallway, Ms. Lozania and Mr. Morales were in front with the banner. Ms. Garcia raised her hands in a stopping motion and said, "Carmen, you can't..." Ms. Lozania moved past her.<sup>19</sup> Ms. Garcia directed a secretary to call 911, and she reported a disturbance at the plant.<sup>20</sup>

10 As they passed the production area, several demonstrators blew their whistles. Hearing the signal, Ms. Espinoza, who had just finished her production shift and turned off her machine,<sup>21</sup> blew a whistle to alert coworkers, joined the demonstrators, and proceeded with them to the office. Sorting employees, Ms. Avena, Ms. Ramirez, Ms. Gonzalez, and  
 15 Mr. Zarate<sup>22</sup> (the four sorting employees), with an hour or so left in their shifts, ceased work to join the demonstration. Delayed by having to remove safety gloves and protective clothing, the four sorting employees did not, however, join up with the demonstrators at that time.

20 After signaling the sorting employees by blowing whistles, the demonstrators, still led by Mr. Gaitan, reached the office area. The full group did not fit within the reception area, and some remained outside the entrance door of the reception area. Mr. Gaitan asked the receptionist to call Mr. Lomax. Shortly thereafter, Mr. Lomax came into the office. Mr. Gaitan, who speaks simple English, told Mr. Lomax employees wanted to talk about their "points." He proffered the petition, saying, "We are UNITE, and we are not scared." Mr. Lomax, looking  
 25 shocked and hurt, declined to accept the petition. Mr. Gaitan put it on a nearby desk, and some of the demonstrators exited the office through doors leading directly to the outside of the plant.

30 Mr. Lomax followed the demonstrators to the outside doorway and told them to leave. As it was the normal time to pick up paychecks from an area adjacent to the front offices, Mr. Gaitan said he was going to pick up his check. Along with other demonstrators, he went back into the facility to where employees waited in line for their checks. Mr. Lomax directed the receptionist to give the demonstrators their checks immediately. After receiving their checks, they left the plant and walked back toward the driveway to meet with union representatives at the entrance to the facility.

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 40 <sup>18</sup> There was significant discrepancy in witness accounts of who carried the banner with Ms. Lozania. The more reliable testimony establishes Mr. Morales as co-banner carrier.

<sup>19</sup> Ms. Lozania's conduct at this time formed the basis of disciplinary action against her, as set forth in detail below.

45 <sup>20</sup> I have accepted Respondent's representation that the label on the 911 tape obtained from the authorities noted two calls having been made from Respondent's facility at the same time, each lasting 1:58 minutes.

<sup>21</sup> Company practice was that machines be shut down at shift completion, production counted, and machines restarted by arriving shift employees. Although Ms. Espinoza was inconsistent as to which machine she worked on that day, I find her testimony that she shut down her machine as customary credible.

50 <sup>22</sup> Mr. Zarate did not sort clothes but lifted bins in the sorting department. For convenience, I refer to all four as sorting employees.

As the demonstrators returned to the driveway entrance, the four sorting employees exited the plant and joined them.<sup>23</sup> The four sorting employees asked the demonstrators what had happened. The demonstrators said Mr. Lomax would not listen to them, and the sorters should return to work. The four sorting employees returned to the plant and upon arriving at the emergency door found Mr. Lomax standing at the top of the steps. The four sorting employees told Mr. Lomax they wanted to go back to work. Speaking to employees in English translated into Spanish by an employee, Mr. Lomax refused to let the employees enter the plant and told them they could not return to work.<sup>24</sup>

The four sorting employees rejoined the demonstrators, and the group returned to the union representatives at the driveway entrance.<sup>25</sup> They reported Mr. Lomax would not let them return to work. Union representatives said Respondent had to let them return to work and directed them to return to the plant and again tell Mr. Lomax they wanted to work.

Accompanied by Mr. Gaitan and several other demonstrators, the four sorting employees returned to the emergency door. Mr. Gaitan, who audio recorded the ensuing interchange, urged employees to knock on the door and say they wanted to work. The four sorting employees did so and chanted, "We want to work. We want to work." Mr. Lomax, whose responses were translated into Spanish, answered, "No, they walked off. They left the job. They walked off. There's no work. No, they left." The employees continued chanting their desire to return to work, and Mr. Lomax continued to refuse, saying the employees had left.<sup>26</sup>

After Mr. Lomax's second rebuff, the group of employees except for Ms. Gonzalez returned to where the larger group of employees and union representatives waited. Instead of joining the union representatives, Ms. Gonzalez detoured to the office to get her paycheck. After picking up her check and realizing Mr. Lomax was not there, she asked her leadman,

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<sup>23</sup> Testimony was inconsistent as to where the demonstrators exited the plant and whether the four sorting employees joined with the demonstrators before or after they exited the plant. I have concluded that reliable testimony places the initial meeting between the demonstrators and the four sorting employees outside the plant.

<sup>24</sup> I do not accept the testimony of Mr. Lomax and other Respondent witnesses that Mr. Lomax said the employees had been permanently replaced. I found the sorting employees' accounts credible. Moreover, no such statement is reflected by the tape recording of the second attempt to return to work, which I consider to be the best evidence of what was said, and if it were not stated in the latter confrontation, it is unlikely it was said in the first. I also do not accept Mr. Zarate's testimony that Mr. Lomax's translator said the four employees were fired. It was not clear whether Mr. Zarate heard that from the translator or a coworker.

<sup>25</sup> Testimony was inconsistent as to the time lapse between the demonstrators entering the plant and returning to the union representatives. The testimony as a whole convinces me the time was brief, certainly less than fifteen minutes.

<sup>26</sup> This exchange is reflected by the audio tape recording, which was received into evidence. The tape ends when an unidentified Spanish-speaking voice says, "Adios, this is where it ends; it stays here."

Eliazar Rodriguez, if she could return to work. When he agreed, she went to her workstation and completed her shift. Fifteen minutes had elapsed between the time she had left her workstation and returned.<sup>27</sup>

5 News that Respondent had refused to permit three of the four sorting employees to return to work spread among employees, many of whom expressed to union representatives their disquiet that coworkers had been “fired.”<sup>28</sup>

10 Because the timing of events is crucial to the issues surrounding the sorting employees’ offers to return to work, Mr. Lomax’s testimony concerning his actions after refusing to accept the petition is recounted in detail:

15 Before the sorting employees first offered to return to work, Mr. Lomax spoke for two to three minutes with employee, Avena Sarmiento, who volunteered that several sorting employees had left their work stations and asked if Mr. Lomax needed to get hold of leadman, Rudy Contreras. Mr. Lomax told her to have Mr. Contreras call him and went to the sorting area for five to fifteen minutes. While there, Mr. Lomax spoke to leadman, Eliazar Rodriguez, who brought Mr. Lomax the soil sorting staffing sheet and told him  
20 four employees were absent from their work stations. Together, they marked the names of the missing workers, noting that Mr. Zarate, Ms. Ramirez, Ms. Avena, and Susano Ayala were not at their work stations.<sup>29</sup> They did not mark Ms. Gonzalez’s name.<sup>30</sup> Mr. Lomax told Eliazar to get some people to take their places and asked employee Carlos Leon who was nearby how late he could work. After this exchange, Mr. Lomax was paged for a telephone call, which he took near the receiving dock. The call was  
25 from Mr. Contreras’s daughter, Vicki Contreras (Vicki). Mr. Lomax told her he wanted workers, and she said she had three unemployed persons with her then. Mr. Lomax asked if they had legal work documents, and when she said they did, he said they were

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40 <sup>27</sup> In cross-examination, Ms. Gonzalez assented to counsel’s question, “You went out the employee exit door, and then almost immediately you went back in through the door by Sonia’s office?” After reviewing Ms. Gonzalez’s testimony, I conclude her agreement to counsel’s suggested scenario does not invalidate her original testimony. I don’t believe she understood her answer might be construed to negate her earlier testimony or that “almost immediately” was  
45 arguably inconsistent with her testimony of having twice solicited from Mr. Lomax an opportunity to return to work.

<sup>28</sup> Following the May 1 events, although the Union continued campaigning among Respondent’s employees, it obtained only four additional authorization cards.

<sup>29</sup> Susano Ayala had been given permission to leave early.

50 <sup>30</sup> The failure to mark Ms. Gonzalez’s name shows, as Respondent agrees, that she was present at her workstation when Mr. Lomax went to the sorting area.

hired; they were to report to the plant immediately, and Ms. Garcia would fill out their paper work for them.<sup>31</sup> After the phone call, several plant employees offered their services to cover for the absent sorting employees, which Mr. Lomax accepted.<sup>32</sup> Thereafter, while walking back to his office, Mr. Lomax observed three employees, Mr. Zarate, Ms. Ramirez, and Mr. Avena, approaching the emergency door. Mr. Lomax detoured to the emergency door and intercepted the employees as they walked up the steps to the entrance. The employees asked to return to work, and Mr. Lomax refused.<sup>33</sup>

## 2. Replacement of Strikers and Offers of Reinstatement

Employee hiring is primarily within the control of Ms. Garcia who reports to the general manager, Bonnie Grate. Ms. Garcia approves who is hired, sometimes checking with Ms. Grate or Mr. Lomax, if applicants are previous employees. Before being hired, each applicant completes an application and undergoes an interview with Ms. Garcia, the two procedures usually taking about 30 minutes. After accepting the position, an applicant completes the required I-9 form, gives proof of legal status, and fills out employment forms. Pursuant to Vicki's instructions that they should report to the plant and fill out paperwork for employment, Jonathan Bourassa, Tom Sardinas, and Rigoberto Valencia arrived at the plant on the afternoon of May 1. They filled out employment documents, and met with Ms. Garcia. Ms. Garcia did not tell them they had been permanently hired. They received preliminary employment training and began working as first shift soil sorters the following day.

Between May 1 and June 2, Respondent did not communicate with Mr. Zarate, Mr. Avena, and Ms. Ramirez. By letters dated June 2, Respondent wrote to them as follows:

We write about the status of your position with Commercial Linen Exchange. On May 1, 2003, you left your job during your shift and refused to return to work despite requests that you do so and despite warnings that the Company would hire permanent replacements.

As you know, by the time you offered to return to work, the Company had hired another individual to fill your former position. We are writing to you to be certain that you understand your rights. As a replaced employee, you are entitled to be considered for preferential rehire into opportunities that the Company desires to fill. Please contact me to verify that you are interested in re-employment opportunities and to be certain that the Company will know how to contact you in the event that jobs become available.

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<sup>31</sup> Regardless of what Mr. Contreras's daughter may have told Mr. Lomax, the three individuals, whom Respondent hired later that afternoon, Jonathan Bourassa, Tom Sardinas, and Rigoberto Valencia, were not with her at the time of the conversation. After her conversation with Mr. Lomax, Vicki telephoned them at Tom Sardinas's home and told them if they wanted jobs, they should go to the plant, that people had walked off the job and Respondent needed replacements; if they went and filled out the paperwork, they would have jobs.

<sup>32</sup> Four employees each worked 1.5 hours the afternoon of May 1 to complete the absent sorters' work.

<sup>33</sup> As set forth above, I have declined to accept Mr. Lomax's testimony that he told employees he had hired permanent replacements for their positions.

When Tom Sardinias quit his employment with Respondent in late May or early June, Respondent did not offer his shift to any of the sorting employees. By letters dated June 19 to Ms. Avena and Mr. Zarate and July 3 to Ms. Ramirez, Ms. Garcia wrote as follows:

5 As of today I have one 2<sup>nd</sup> shift soil sort position available. The starting times for this shift are 4:00 p.m. on Thursday, Friday and 2:00 pm Saturday and Sunday. The scheduled days off are Monday, Tuesday, and Wednesday. Your wage would be \$7.45/hour (the starting rate plus an adjustment for previous experience).

10 Please be advised that this position has been offered to all people on priority hire status, and will be given to the first person that contacts me...

15 The initial reinstatement offers were at hourly rates lower than employees had previously earned though with adjustment for prior service and without restoration of seniority. Mr. Zarate did not accept a proffered position because of physical impairments. Respondent required Ms. Ramirez and Ms. Avena to complete employment applications and other employment forms, and Ms. Garcia told Ms. Ramirez she could not keep her accumulated sick leave. Later Respondent permitted the recalled employees to retain their pre-replacement seniority.

### 20 3. Discharge of Carmen Lozania

Respondent terminated Ms. Lozania because of reported misconduct toward Ms. Garcia on May 1, during the demonstration. A number of witnesses testified concerning the alleged confrontation between Ms. Garcia and Ms. Lozania as follows:

25 Ms. Lozania's testimony: Ms. Lozania and a fellow employee carried the banner while Ms. Lozania held her child's hand as well. At the commencement of the demonstration and after a few employees, including the banner bearers, had entered the plant through the emergency door, Ms. Garcia stopped them, saying, "Carmen, you cannot go in."  
30 Ms. Lozania said the employees just wanted to talk to Terry. When Ms. Garcia saw other employees entering the plant behind the banner bearers, she said, "Oh my God," and left. Ms. Lozania neither pushed nor even touched Ms. Garcia. Neither Bonnie Grate nor Connie Noble was present.

35 Ms. Garcia's testimony: The demonstration came as surprise to Ms. Garcia. She first knew of it when employees entered the plant. She saw Ms. Lozania and Mr. Morales holding the banner. As Ms. Lozania came within a few feet of her, Ms. Garcia held up her hands, palms out, and said, "Carmen, you can't ..." Without permitting Ms. Garcia to finish her remonstrations, Ms. Lozania shoved her aside with a sweeping motion of one  
40 arm and continued toward the offices. Ms. Garcia told the receptionist to dial 911. Ms. Garcia spoke to the 911 dispatcher, saying a riot of some sort was going on, that about 20 to 25 employees were on the premises with a banner, and the company needed someone to prevent the situation from getting out of hand. She did not say she had been hit or physically touched. The police arrived after the group had dispersed.  
45 Ms. Garcia did not file a police complaint.

Ms. Noble's testimony: She saw Mr. Morales with Ms. Lozania. Standing about five feet  
50 behind Ms. Garcia as the demonstrators approached, she saw Ms. Garcia hold out her hands toward Ms. Lozania and saw Ms. Lozania brush her aside with a backhanded sweeping gesture.

Ms. Grate: Ms. Grate did not see Mr. Gaitan enter the plant; she saw Ms. Lozania enter through the emergency door without any child.

5 Ms. Espinoza's testimony: During the demonstration, she observed Ms. Lozania held a child's hand in one of hers and one end of the banner in the other. She saw Ms. Garcia nearby but did not see Carmen hit anyone.

10 Ms. Caranza's testimony: she participated in the demonstration, entered the plant through the emergency door at the side of Mr. Gaitan, and walked beside him to Mr. Lomax's office. Ms. Lozania was in the group behind Mr. Gaitan when he presented the petition. She observed Ms. Lozania during the entire demonstration and saw her holding the banner with one hand and her child with the other. She never saw her release the banner or the child, and she never saw her strike Ms. Garcia. She first saw Ms. Garcia and Ms. Grate at the "end of the office."

15 Mr. Alvarado's testimony: Ms. Lozania and an employee named Guillermo (last name unknown) held the banner. Ms. Lozania also held a child's hand. During the petition procession to Mr. Lomax's office, Mr. Alvarado preceded Ms. Lozania by about ten feet, however he could see her the entire time.<sup>34</sup> He saw no physical contact between Ms. Lozania and Ms. Garcia.<sup>35</sup>

25 On May 2, Ms. Garcia reported to Respondent that Ms. Lozania had pushed her during the demonstration. On that same day, about two hours into Ms. Lozania's work shift, Ms. Grate instructed Ms. Lozania to report to the office where Mr. Lomax, through an interpreter, told her she was terminated because of her violent interaction with Ms. Garcia on the preceding day.<sup>36</sup> Ms. Lozania asked that Ms. Garcia appear with her before Mr. Lomax to answer the charges, but he refused. Mr. Lomax said he had several witnesses to the incident although he did not name them. Ms. Lozania said she also had several witnesses, but she declined to identify them because she "did not want him to know at that time," fearing he could take reprisal action

30 against them. Mr. Lomax said she could appeal the decision to Ms. Grate. Mr. Lomax gave Ms. Lozania a termination notice written in Spanish, the translation of which is, in pertinent part:

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<sup>34</sup> I cannot accept either Ms. Caranza or Mr. Alvarado's testimony of having observed Ms. Lozania during the entire demonstration. Both were well in front of Ms. Lozania during the pertinent time. It is unlikely they saw all that occurred behind them. As an example of

40 Ms. Caranza's lack of reliable observation, she testified she did not see either Ms. Garcia or Ms. Grate until the demonstrators reached the office although both Ms. Garcia and Ms. Grate were present during the demonstrators' march.

<sup>35</sup> Although witnesses put Leticia Alvarez at the forefront of the Demonstration, and Counsel for the General Counsel called her as a witness, she was not asked whether she saw any

45 confrontation between Ms. Garcia and Ms. Lozania.

<sup>36</sup>Ms. Lozania had no prior record of discipline. Respondent's employee handbook describes an investigatory suspension as a possible step in its disciplinary process. Respondent's failure to put Ms. Lozania on suspension pending investigation is not inconsistent with the handbook, which provides for termination without exercise of prior constructive counseling options upon

50 violation of Respondent's workplace violence policy. Ms. Lozania agreed that if an employee shoved another, the employee would be discharged.

On the 1<sup>st</sup> of May 2003 Carmen manifested an act of violence against Sonia Soto. Carmen physically pushed Sonia Soto, and this was observed by several witnesses...acts of violence are forbidden in the workplace...the company's tolerance level for any act of violence in the work force or work place is zero.

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After her termination, with the assistance of Ms. Figgins, Ms. Lozania appealed Respondent's action to Ms. Grate. She did not tell either Ms. Figgins or Ms. Grate the names of her witnesses. In connection with the appeal, Ms. Grate conducted an investigation of the incident between Ms. Lozania and Ms. Grate. Ms. Grate prepared the following list of questions for managers and leadmen to ask employees:

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1. Were you on premise between 1:40 p.m. and 2:10 p.m. on Thursday, May 1?
2. Were you in a position to see the area between the ironers And the West wall (where the door is)?
- 15 3. Did you see anyone carrying a banner or a sheet w/ writing on it?
4. Describe what you saw that person/those people do.
5. Did you see anyone pushing or shoving another person or each other?
6. If yes, was this in a friendly, playful manner, or in a threatening, aggressive manner, or in some other manner?

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Most employees questioned denied being in a position to see any such interaction. Employee Mario Palacios answered that he saw Carmen and Guillermo carrying a sheet and walking to the office but saw no pushing or shoving. Ms. Garcia wrote that she observed individuals

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[w]alking toward front office carrying a banner so I approached them and put my hands up in a "stop" motion & said in Spanish 'Carmen, this is not allowed on the company premises.' She shoved me back with her right arm and continued to walk toward the front office. The other people kept walking. The second 'middle' person was Guillermo. I didn't see who the other person was...I was shoved out of the way by Carmen Lozania...[i]n a threatening and aggressive manner.

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Ms. Noble wrote that she,

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saw Miguel with a sheet or something wrapped around him—then he took it & then Carmen and Guillermo had it. I started to go to a phone to call for Terry and...[Ms. Grate was] already on the floor. I saw [Ms. Grate] holding [her] hands up and telling people not to come in that door and motioning to the office. I saw them push by [Ms. Grate]. Then I saw Sonia walking up to Carmen & Sonia stopped and was talking with her hands up. I saw Carmen push Sonia out of her way and Carmen just kept walking. I was scared and got on the phone and called 911—I told the operator that the people coming in were using physical force and to get here right away...Carmen pushed Sonia like 'get out of the way'—she was aggressive.

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Ms. Noble was only the only witness to corroborate Ms. Garcia's account of her interaction with Ms. Lozania. After conducting the investigation, Ms. Grate affirmed the termination decision. Ms. Lozania did not take the next appeal step.

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## 4. May 2 Warning Notice to Ms. Espinoza

Ms. Noble reported to Mr. Lomax and Ms. Grate that she saw Ms. Espinoza turn off machines other than her own after the demonstration began. Ms. Espinoza denied she had done so. After reporting to work on May 2, Ms. Espinoza, an open union supporter, was directed to meet with Ms. Garcia and Mr. Lomax. Ms. Garcia and Mr. Lomax told Ms. Espinoza that supervisors had reported she turned off machines on the previous day.<sup>37</sup> Ms. Garcia asked why she had been going around turning off machines and said if it happened again she would be fired. Ms. Espinoza denied that she had turned off any machine other than the one she had been operating. Ms. Garcia declined to hear anything more from Ms. Esteban and gave her a Constructive Counseling Notice dated May 2 and marked "Written Warning." The Constructive Counseling Notice accused Ms. Espinoza of dangerously and unauthorizedly stopping machines and cautioned her against similar conduct.

In determining whether Respondent justifiably charged Ms. Espinoza with turning off machines during the demonstration, I have considered my favorable observations of Ms. Espinoza, whom I found to be a generally reliable and credible witness. I note Ms. Noble went down to the production floor from her upstairs office after she heard the whistling that heralded the demonstration. By all accounts, confusion and disorder reigned, and Ms. Noble was besieged with employee reports that someone was turning off the machines. In those circumstances, I find it likely Ms. Noble was mistaken in her impressions. Although I consider Ms. Noble had a good faith belief that Ms. Espinoza engaged in misconduct, I find Ms. Espinoza's testimony to be a credible account of what occurred, and I conclude she did not turn off any but her own machine.<sup>38</sup>

## 5. Mid-June Oral Reprimands to Ms. Espinoza and Yolanda Dominguez Pena

In mid June, Ms. Garcia called Ms. Espinoza and Yolanda Dominguez Pena (Ms. Pena) to her office after an employee meeting conducted by supervisor Javier Rodriguez (Javier). During that meeting, Ms. Espinoza had told Javier that the drinking water was not good and that her stomach hurt when she drank it. Ms Garcia accused Ms. Espinoza of interrupting Javier during the meeting. Ms. Garcia told Ms. Espinoza to let Javier do his job, that after Javier said what he had to say he would open it up for questions, and Ms. Espinoza could raise her questions with Javier after that. Ms Espinoza protested the water was physically harmful. Ms. Garcia told Ms. Espinoza not to make any more comments about the water, that if she talked to other workers any more about the water, she would have problems. I accept Ms. Espinoza's testimony that during the meeting with Javier when he said the plant was very hot, and employees should drink water, she asked, "How is it you want us to drink water? The water is no good; it hurts our tummies." I also credit Ms. Pena's testimony that Ms. Espinoza did not interrupt Javier during the meeting.

<sup>37</sup> Mr. Lomax's statement was not entirely accurate. Although leadman Nicolas Galarza testified he heard Ms. Espinoza say, "Stop the machines and follow me," he did not, apparently, see her turn any off. Therefore, Ms. Noble's was the only report of Ms. Espinoza's misconduct.

<sup>38</sup> Although the General Counsel has alleged Ms. Espinoza's warning notice to violate Sections 8(a)(1) and (3) of the Act, I have discussed it below as an independent violation of Section 8(a)(1).

Ms. Garcia testified that employees complained Ms. Pena had “mistreated” them by calling them cowards for no longer supporting the Union. Without specifying what words or portions of Ms. Pena’s discussions with coworkers she objected to, Ms. Garcia told Yolanda, “[T]wo of your coworkers have complained about some discussion that’s going on in the back, and I just want to ask you just to change your topics of discussion so that there’s no... more problems.”<sup>39</sup>

#### D. The Appropriate Unit

Respondent’s drivers transport dirty linen from customers to the plant. Production employees unload the product, which sorting employees sort into bins. The bins go into an overhead transport system that moves dirty product to the washing area where it is washed, dried, and ironed. The clean product is bundled, tied, loaded, and transported back to customers by the drivers. The process takes four to six hours from time of product entry to exit.

In reaching the Stipulated Election Agreement, representatives of Respondent and the Union never met. All positions and discussion regarding the unit were communicated through Board Agent Keith Ebanholtz (Mr. Ebanholtz) of Region 28. Ms. Stewart handled the Stipulated Election Agreement for the Union, and Victoria Davidson (Ms. Davidson) and Bonnie Grate (Ms. Grate) handled it for Respondent.

At Mr. Ebanholtz’s request, Respondent sent a list of employee names and classifications to Mr. Ebanholtz, including the linen room attendant (LRA) classification.<sup>40</sup> Employees named under the LRA classification erroneously included Frank Payan, Teresa Moreno, and Maria Luisa Espinoza who work in job classifications other than LRA and who perform their work at the plant.<sup>41</sup> None of the employees appropriately classified as LRAs worked at the plant; their physical workstations were at five area hospitals under contract with Respondent for linen supply services.<sup>42</sup> Respondent’s representatives did not communicate to Mr. Ebanholtz the locations of the LRAs and did not discuss with him the “employed by the Employer at its laundry facility located at 4445 South 36<sup>th</sup> Street...” language of the unit description. Of Respondent’s six to seven collective-bargaining agreements covering laundry workers, only one includes off-site LRAs in the unit.

In the course of working out the unit stipulation, Ms. Stewart understood Mr. Ebanholtz to say that Respondent wanted to be more precise as to the job classifications included in the unit. Specifically, Respondent wanted to add the classification LRA to the unit description. Ms. Stewart said she had no objection as long as the LRAs worked in the plant. Ms. Stewart assumed the words “employed by the Employer at its laundry facility located at 4445 South 36<sup>th</sup> Street...” restricted the unit to those who worked physically at the plant. She was never informed the LRAs worked at hospitals and would not have agreed to their inclusion in the unit if

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<sup>39</sup> Ms. Pena appears to have understood Ms. Garcia was referring to union-related discussions with coworkers.

<sup>40</sup> Although this classification is referred to herein as linen room attendant, Respondent’s usual designation was Hospital Linen Distributor.

<sup>41</sup> Frank Payan worked as a dock coordinator.

<sup>42</sup> Of the classifications submitted to Mr. Eganholtz, only the LRA classification comprised employees whose work locations were away from the plant.

she had known.<sup>43</sup> When Ms. Stewart received the Excelsior list, she continued to be unaware the LRA workstations were not within the plant as Respondent had mistakenly included as LRAs the names of two employees whom Ms. Stewart knew to be employed in the plant.<sup>44</sup> Following personal contact with employees listed on the Excelsior list, the Union concluded employees listed as LRAs were not employed at the plant and therefore not appropriately within the stipulated unit. At the election the Union challenged the ballots of all LRAs.

The LRAs work one or two to a hospital site and only one shift (generally day) unlike the around-the-clock plant operation. Unlike the plant employees, they must be able to communicate in English and possess basic math skills. Although plant employees may apply for open LRA positions, such transfers are rare. Under Arizona State law individuals employed on hospital premises must undergo criminal background checks, which are not required for plant employees. LRAs report to the assigned hospital for work shifts and record their work hours there. LRA supervisor Reyes checks on LRAs and their work at the hospitals or interacts with them by telephone. LRAs report to the plant for biweekly training meetings on Thursday paydays, which are not attended by plant employees. Those LRAs who do not have direct paycheck deposit also pick up their paychecks at the plant. LRAs have virtually no contact with plant employees. In handling laundry at the hospitals, LRAs accept clean laundry deliveries from Respondent's drivers (a classification excluded from the unit), maintain the linen rooms at the hospitals, and remove already-bagged dirty laundry by cart to where the drivers pick it up.

### III. Discussion

#### A. Independent violations of Section 8(a)(1) of the Act

##### 1. Alleged Surveillance and Threat of Reprisal

The General Counsel contends Ms. Noble's conduct in the early hours of April 28 (asking Mr. Gaitan and Mr. Castro what was going on, taking union literature from Mr. Castro, watching the group from the windows and doors of the plant, approaching the group of employees and organizers to "see who [was there]," and later while back at the plant, making writing motions) constitute unlawful surveillance and veiled threat of reprisal.

Mere supervisory observation of "open, public union activity on or near [an employer's] property does not constitute unlawful surveillance." *Town & Country Supermarkets*, 340 NLRB No. 172, slip op. 7 (2004); *Fred'k Wallace & Son*, 331 NLRB 914 (2000). The early morning union activity of April 28 was openly staged near Respondent's plant so as to attract employees leaving work at shift change. The Union posted a large banner at a picnic table just outside plant boundaries and the group urged workers to join them there. In these circumstances, Ms. Noble's

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<sup>43</sup> Ms. Davidson testified that on May 9, she had a conversation with Mr. Ebanholtz in which he told her Respondent's Tuscon LRAs would not be permitted to vote because they worked a considerable distance from the plant and did not report there daily. Even assuming an inference can be drawn from this conversation that Mr. Ebanholtz was aware LRAs did not work in the plant, it does not provide evidence of union awareness. At the time of this conversation, the Union had already signed the Stipulated Election Agreement dated May 6, and there is no evidence the Union knew the work locations of LRAs prior to executing the stipulation.

<sup>44</sup> Although it dropped the name of Teresa Moreno as an LRA employee when generating the Excelsior list, Respondent inadvertently included the names of Maria Luisa Espinoza and Frank Payan under the classification of LRA in the Excelsior list furnished to the Region and thereafter to the Union.

observing the activity cannot be deemed surveillance. Her asking an off duty employee if she could see, and then accepting a sample of, the union literature he carried into the plant also do not constitute surveillance. The employees had no legitimate basis for being in the plant at that time of the night, and they openly carried union literature with them. In those circumstances, neither Ms. Noble's inquiry nor her literature requisition could, without more, have coerced the employees or made them think she was observing their union activities. Finally, her approaching the picnic table to see who was congregated there is not surveillance. The plant was indisputably located in a rough area of town, and the activity occurred in the middle of the night, both of which circumstances justified Ms. Noble's investigation. Ms. Noble neither commented on employees' activities nor took any action to interfere with them. As to Mr. Briebiezca's belief that she later wrote down participating employees' names, the evidence doesn't allow me to share his opinion. Accordingly, I do not find Ms. Noble engaged in unlawful surveillance or made any veiled threat of reprisal.

## 2. Informing Employees That Union Activities Were Viewed as a Personal Affront

Mr. Lomax was personally offended by the demonstration, and he repeatedly informed employees he had taken affront. Employee involvement in the demonstration was protected under Section 7 of the Act. By his communication of surprise and hurt at employees' prounion display, Mr. Lomax implicitly equated engaging in protected activity with disloyalty to him and, concomitantly, the company. Respondent thereby violated Section 8(a)(1) of the Act. *Westwood Health Care Center, a division of Medcare Associates, Inc.*, 942 (2000); *Dauman Pallet, Inc.*, 314 NLRB 185, 186 fn. 7 (1994).

## 3. Statements Made at Video Presentations

When Ms. Garcia told employees wages would be frozen during negotiations, she did not restrict the projected freeze to those benefits and/or wage increases that differed from Respondent's past practices. With regard to wage increases, Respondent reviews each employee annually. Based on the points achieved on the review, Respondent grants individual wage increases, the maximum of which is four per cent. Plainly, Respondent has an established past practice and procedure for granting wage increases, and employees have a reasonable expectation of being eligible for an increase under that procedure. Accordingly, Respondent's union campaign statement that wages would be frozen during contract negotiations is unlawful under 8(a)(1) of the Act. *Superior Emerald Park Landfill, LLC*, 340 NLRB No. 54, slip op. 8 (2003); *Desert Aggregates*, 340 NLRB No. 39 (2003) and cases cited therein at fn. 9.

## 4. Respondent's Involvement in Authorization Card Revocation

At video meetings, Ms. Garcia invited employees to obtain information from her on how to retrieve their authorization cards. Respondent posted similar offers on its bulletin boards. Citing *Vestal Nursing Center*, 328 NLRB 87, 101 (1999), the Board in *Mohawk Industries*, 334 NLRB 1170, 1171 (2001) held:

An employer may...advise employees that they may revoke their authorization cards, so long as the employer neither offers assistance in doing so or seeks to monitor whether employees do so nor otherwise creates a situation where employees would tend to feel peril in refraining from revoking. *R.L. White Co.*, 262 NLRB 575, 576 (1982). Thus, an employer may not offer assistance to employees in revoking authorization cards in the context of other contemporaneous ULPs. [citation omitted].

Here, Ms. Garcia did not merely advise employees of their rights, she encouraged them

to contact her to find out how to get their cards back and when they did so, collected their revocations. Although Ms. Garcia's motive may have been innocent of any wish to ascertain employee sentiment, the procedure permitted Respondent to observe whether employees availed themselves of the opportunity to revoke their cards. Moreover, because the invitation to revoke authorization cards came almost immediately after Respondent's refusal to return prounion demonstrators to work (discussed below), employees would reasonably feel imperiled if they did not revoke. Accordingly, I find Respondent independently violated Section 8(a)(1) by its solicitation of employees to revoke authorization cards. *Mohawk Industries*, supra; *Wayne J. Griffin Electric, Inc.*, 335 NLRB 1362, 1375 (2001); *Escada (USA), Inc.*, 304 NLRB 845, 849 (1991) (distributing a sample revocation letter to employees in the context of other unfair labor practices unlawful); *Chelsea Homes*, 298 NLRB 813, 834 (1990), enf. mem. 962 F.2d 2 (2d Cir. 1992) (distinction drawn between lawfully providing "ministerial or passive aid in withdrawing from union membership" and unlawfully "actively solicit[ing], encourag[ing], and assist[ing] such withdrawals"); cf. *Mid-Mountain Foods*, 332 NLRB 229, slip op. 3 (2000) (no violation where the employer "neither tracked whether employees availed themselves of their right to revoke their union authorizations nor assisted them in the revocation process beyond simply telling them about the forms.") *Cooking Good Division of Perdue Farms, Inc.*, 323 NLRB 345 (1997) (revocation forms with instructions and addresses of Board and union available throughout the plant, with some revocations mailed by the employer.)<sup>45</sup>

#### 5. May 2 Written Warning Notice to Ms. Espinoza

Respondent disciplined Ms. Espinoza because of its good faith but mistaken belief that she had engaged in misconduct during the course of her protected participation in the demonstration. In *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), the Supreme Court affirmed the Board's rule that an employer violates Section 8(a)(1) by discharging or disciplining an employee based on its good-faith but mistaken belief the employee engaged in misconduct in the course of protected activity. *Id.* at 23-24. I conclude Respondent violated Section 8(a)(1) of the Act by issuing a written warning to Ms. Espinoza for shutting down machines other than her own on May 1. In light of this conclusion, it is not necessary to consider whether Respondent's conduct also violated Section 8(a)(3) of the Act as alleged in the Complaint. *La-Z-Boy Midwest*, 340 NLRB No. 10, slip op. 1 (2003), citing *Shamrock Foods Co.*, 337 NLRB 915 (2002) (no issue of motivation where discipline based on a mistaken belief of misconduct in the course of protected activity.)

#### 6. The Post-Election Celebrations

The General Counsel contends Respondent's post-election victory celebrations violated the Act as an unlawful grant of benefit to reward employees for rejecting the Union. Board law does not support such a conclusion. "The Board has long held that a union's or an employer's provision of refreshments and dinners during organizing campaigns is within the realm of permissible conduct [citations omitted]." *Lamar Co., LLC*, 340 NLRB No. 114 (2003); see also *Raleigh County Commission on Aging, Inc.*, 331 NLRB 925 (2000), where holding a promised post-election victory dinner for employees did not constitute objectionable conduct. If such

<sup>45</sup> These latter two cases, cited by Respondent, differ from the instant situation in the degree of employer involvement. Here, at least initially, employees were advised to see Ms. Garcia for information and assistance on revocation.

celebrations are not objectionable, *a fortiori*, they cannot violate 8(a)(1) of the Act. Accordingly, I shall dismiss this allegation of the Complaint. However, statements made by Respondent's management officials during the celebrations are a different matter.

5           In the victory atmosphere of the post-election parties, Ms. Grate told employees they would have to work together as a team, and employees unwilling to do so or who would not be happy doing so should leave Respondent's employment. In safety meetings conducted thereafter, Ms. Noble voiced similar sentiments when she told employees they should put whatever went on before the election behind them, and if they could not work together, they  
10           should look for other work. In the context of celebrating a win over the Union, Ms. Grate's statements that employees henceforth needed to work as a "team" could reasonably have been construed as cautionary notice to abandon union support. By telling employees that those unwilling to work as a "team" should explore other employment opportunities, Respondent framed the none-too-subtle equation that union support plus attendant employee division and unhappiness equaled tenuous job security. Ms. Noble's later statements even more strongly associated employee dissatisfaction with union support when she told employees they should put preelection feelings behind them and work together. In the absence of Section 7  
15           assurances, Ms. Noble's call for employee unification could reasonably be seen as an admonition that prounion activity, which had formerly divided employees and caused dissension, must be abandoned if employment were to continue. Employees would be even more likely to draw such an inference because of the unfair labor practices committed by Respondent in its campaign against the Union. Respondent's argument that its motive in making such statements was legitimately to boost employee morale and cooperation, even if true, is unavailing. In determining whether a statement constitutes a threat in violation of  
25           Section 8(a)(1) of the Act, the Board does not consider subjective factors but rather whether, under all the circumstances, the statement reasonably tends to restrain, coerce, or interfere with employees' rights guaranteed under the Act. *Reeves Bros. Inc.*, 320 NLRB 1082, 1084 (1996); *Sunnyside Home Care Project*, 308 NLRB 346, fn. 1 (1992). The positive purpose behind the statements, as urged herein by Respondent, is likewise irrelevant. *President Riverboat Casinos of Missouri*, 329 NLRB 77 (1999). Accordingly, I conclude both Ms. Grate and Ms. Noble implicitly threatened employees with reprisals if they continued to engage in union activities. See *Paper Mart*, 319 NLRB 9 (1995); *Jack August Enterprises, Inc.*, 232 NLRB 881 (1977).  
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#### 7. Post-election Grant of Benefits

35           In the months following the election, Respondent installed a swamp cooler and replaced three water fountains in its plant. Beginning in April and continuing thereafter, it also permitted employees daily to wear new rather than used protective gloves. During the summer, Respondent also provided employees with Gatorade or similar drink. The General Counsel contends such changes in plant and safety equipment and drink supply constituted unlawful  
40           grants of benefit to reward employees for rejecting the Union.

          It is not per se unlawful for an employer to grant benefits to employees in the midst of union organizational activity, and, presumably, it is not per se unlawful to grant them following the activity. The burden is upon the General Counsel to establish "by a preponderance of the  
45           evidence that employees would reasonably view the grant of benefits as an attempt to interfere with or coerce them in their choice on union representation." *Southgate Village*, 319 NLRB 916 (1995). Logic dictates that the General Counsel's burden is a heavy one when the grant of benefit occurs after an unsuccessful representational bid. Otherwise any employer grant of benefit could be suspect because it might deter contented employees from desiring future  
50           representation. In any event, Counsel for the General Counsel has cited no cases in support of the theory that post-election grant of benefits independently violate Section 8(a)(1) of the Act, and I conclude that where no preelection promise of benefit was made, and no coercive

statements accompanied Respondent's salubrious post-election changes, they did not independently violate Section 8(a)(1) of the Act. Whether the changes violated Section 8(a)(5) of the Act is discussed below.

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## 8. Oral Reprimands of Ms. Espinoza and Ms. Pena

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In mid-June Ms. Espinoza engaged in protected activity when, in an employee meeting, she complained to her supervisor about the quality of drinking water. *Air Contact Transport, Inc.*, 340 NLRB No. 81 (2003). Ms. Pena also engaged in protected activity when she talked of the Union to other employees. Ms. Garcia orally reprimanded the two for engaging in the protected conduct. Respondent argues no discipline was administered, but even an undocumented "caution" as Respondent styles its interchange with the two employees, may violate the Act if it restrains or coerces employees. I do not find Ms. Garcia was motivated by any antiunion considerations when she reprimanded or cautioned Ms. Espinoza and Ms. Pena. Rather, I conclude she had a good faith but mistaken belief the two employees had engaged in misconduct.<sup>46</sup> An employer violates Section 8(a)(1) when it disciplines an employee based on its good-faith but mistaken belief the employee engaged in misconduct in the course of protected activity, *NLRB v. Burnup & Sims*, supra, at 23-24. Alternatively, if Respondent's caution did not rise to a disciplinary level, Respondent restrained and coerced the two employees in the exercise of their Section 7 rights. I conclude Respondent violated Section 8(a)(1) of the Act by reprimanding or cautioning Ms. Espinoza and Ms. Pena for engaging in protected activity but did not violate Section 8(a)(3) of the Act, as alleged in the complaint.

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### B. Violations of Section 8(a)(3) of the Act

#### 1. Discharge of Striking Employees

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When the four sorting employees left the sorting line at about 2:00 p.m., May 1, and joined the demonstration to protest working conditions and to signify their support of the Union, they were engaged in protected activity. *Accel, Inc.*, 339 NLRB No. 134 (2003); *Dayton Newspapers, Inc.*, 339 NLRB No. 79 (2003). When they returned to the plant and, without setting any conditions, told Mr. Lomax they wanted to go back into work, they made unconditional offers to return to work. *Diamond Walnut Growers, Inc.*, 340 NLRB No. 135, slip op. 2 (2003) (an offer does not have to use the word "unconditional" to be valid). Under the provisions of *Laidlaw Corp.*, 171 NLRB 1366 (1968), they were entitled to reinstatement to their former jobs when they unconditionally applied to return to work unless those positions had been filled by permanent replacements prior to their offers to return to work. *Detroit Newspapers*, 340 NLRB No. 121 (2003). Advising economic strikers they have been permanently replaced when they have not been "constitutes a discharge in violation of Section 8(a)(3) and (1) of the Act. *Consolidated Delivery & Logistics, Inc.*, supra at 525 and fn. 5. The General Counsel contends Respondent had not permanently replaced the four sorting employees at the time of their offers

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<sup>46</sup> Respondent offered no direct evidence that Ms. Pena had called any employees cowards. Even assuming Ms. Pena did so and that such was unprotected, Ms. Garcia's caution or reprimand to Ms. Pena encompassed all union discussion with coworkers and thereby infringed on protected activity.

to return to work; therefore, its refusal to permit three of them to resume their jobs was both an unlawful discharge and an unlawful refusal to reinstate each of them. Respondent, on the other hand, argues that Respondent lawfully and permanently replaced the employees before they ever asked to return to work and that it never discharged them.

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It is undisputed that within the same half hour they left their workstations, the sorting employees offered to return to work. The crucial question is whether they made their offers before or after Respondent found replacements for them. Both Respondent and the General Counsel presented considerable evidence regarding the timing of the offers to return to work. After a careful review of the evidence, I conclude the sorting employees offered to return to work before Respondent replaced them with new employees.

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Much of the testimony regarding the sorting employees' offers to return to work was conflicting. In reaching my conclusion, I have focused primarily on the testimony of Mr. Lomax and Ms. Gonzalez and find that both accounts support a conclusion that the offers to return to work occurred pre-replacement. I found Ms. Gonzalez to be a fully credible witness, forthright and sincere. As of the hearing date, she no longer worked for Respondent, and because of coworker hostility toward her for having returned to work on May 1, she had been estranged from union supporters before that. I saw no indication of any desire or tendency to testify in a way that would favor one side over the other or, indeed, any awareness of how her testimony might impact the issues. I accept her testimony of what occurred the afternoon of May 1. Although I found Mr. Lomax to be generally a straightforward and sincere witness, his testimony regarding replacement of the sorters suffers from inherent incongruity, and where it reaches irresolvable conflict with that of Ms. Gonzalez, I accept her testimony over his.

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Mr. Lomax testified of having taken a number of actions between the time he bade the demonstrators leave the premises and the time he received offers to return to work from the four sorting employees. His activities include speaking for two to three minutes with employee, Avena Sarmiento, spending five to fifteen minutes in the sorting area speaking to leadman, Eliazar Rodriguez and ascertaining and marking the names of sorting employees who had absented themselves from their work stations, arranging for substitute workers from the existing workforce, and taking a telephone call in the course of which he authorized three individuals to report to the plant to fill out employment papers.<sup>47</sup> Giving weight to Ms. Gonzalez's account, I find the time between her leaving the plant to join the demonstrators and returning to the emergency door to request readmittance to work was very brief, in fact, a matter of only fifteen minutes. It is highly improbable, indeed logistically impossible, for Mr. Lomax to have accomplished his asserted tasks and employed three new workers in so short a time. Moreover, and most compellingly, Ms. Gonzalez had indisputably returned to her workstation and resumed her work duties before Mr. Lomax made any offers of employment to replacement workers.<sup>48</sup> Since she surreptitiously returned to work after she and the other employees made

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<sup>47</sup> I have assumed only for purposes of this analysis that Mr. Lomax's instructions to Vicki constituted job offers to Jonathan Bourassa, Tom Sardinias, and Rigoberto Valencia. There is nothing in Vicki's recommendation to the three men that they go to the plant and fill out paperwork if they wanted jobs to suggest they had actually been hired. Rather, she merely notified them of the likelihood of employment, which is far short of job offer and acceptance, both of which must exist to create a "mutual understanding" of permanent employment. *Consolidated Delivery & Logistics*, 337 NLRB 524, 526, fn. 5 (2002); *Solar Turbines, Inc.*, 302 NLRB 14 (1991).

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<sup>48</sup> In its post-hearing brief, Respondent concedes that Ms. Gonzalez "returned to work before replacements were hired."

offers to do so, it follows that Mr. Lomax had not replaced any of the striking sorting employees at either of the two times the sorting employees attempted to return to work and certainly not when they first offered to return to work. I conclude therefore that Respondent unlawfully refused to reinstate the four sorting employees to their former positions upon their unconditional request offers to return to work and discharged Mr. Zarate, Ms. Ramirez, and Mr. Avena in violation of Section 8(a)(3) and (1) of the Act.

Assuming, *arguendo*, that Mr. Lomax had, in fact, hired replacement employees before the sorting employees offered to return to work, I nonetheless conclude Respondent discharged Mr. Zarate, Ms. Ramirez, and Mr. Avena. The expressions used by Mr. Lomax in rebuffing the employees' offers to return to work during both attempts do not reflect an intention permanently to replace the employees but, rather, are fully consistent with discharging them. Thus when Mr. Lomax first refused the employees admittance to the plant, he said nothing about having replaced them, saying only that they could not return to work. Upon the employees' second attempt, Mr. Lomax again said nothing about replacement but insisted there was no work, repeatedly telling them they had walked off the job. A month went by before Respondent notified the employees, in writing, that they had been replaced, and when replacement Tom Sardinias quit in late May or early June, Respondent did not offer the vacated position to any of the sorting employees. When the replaced employees were offered a sorting position in July, Respondent initially treated them as new hires. In these circumstances, I conclude, irrespective of whether Respondent had permanently replaced Mr. Zarate, Ms. Ramirez, and Mr. Avena when they offered to return to work on May 1, Respondent unlawfully discharged them on that date for engaging in a protected work stoppage.<sup>49</sup>

By refusing to permit Mr. Zarate, Ms. Ramirez, and Mr. Avena to return to work after their unconditional offers to do so and by terminating them for engaging in a protected work stoppage, Respondent refused to reinstate the three employees and discharged them in violation of Section 8(a)(3) of the Act. *Consolidated Delivery & Logistics*, 337 NLRB No. 81, slip op. 2 (2002).

## 2. Discharge of Carmen Lozania

Ms. Lozania was unquestionably engaged in protected activity when she participated in the May 1 demonstration. Whether she lost the protection of Section 7 of the Act, depends on whether as Respondent contends, she pushed or shoved her supervisor, Ms. Garcia, during the demonstration, or whether, as the General Counsel contends, no such misconduct

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<sup>49</sup> Respondent's motivation is not in issue; all actions toward the three sorting employees were pursuant to their having engaged in protected work cessation. It is, therefore, unnecessary to apply the Board's analytical framework for deciding cases turning on employer motivation set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1<sup>st</sup> Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Contrary to the General Counsel's argument, I also conclude a *Burnup & Sims* analysis is inappropriate. Respondent does not dispute the three sorting employees engaged in protected activity or contend any misconduct in the course of the protected activity justified Respondent's actions toward them. The questions are essentially factual: did Respondent properly and permanently replace striking employees or did it refuse to do so and discharge them.

occurred.<sup>50</sup> After considering all the evidence regarding Ms. Lozania's conduct, I am persuaded Ms. Garcia's account is credible. In reaching that determination, I have considered the manner and demeanor of both witnesses. I found Ms. Garcia, who testified extensively on many issues, to be forthright and sincere. I noted that although Ms. Lozania asserted to management that exculpatory witnesses existed, she refused to name them. I cannot accept her claimed wish to avoid exposing them to retaliation since, presumably, they were a part of the demonstration and already known to management as union supporters. I conclude Ms. Lozania did, in fact, push or shove Ms. Garcia aside as she walked with the demonstrators to the plant office. That conclusion does not, however, resolve the matter. The issue of whether Ms. Lozania's conduct was so severe as to cost her the protection of the Act remains.

The Board and the courts in considering nonphysical conduct have recognized,

[E]ven an employee who is engaged in concerted protected activity can by opprobrious conduct, lose the protection of the Act. The decision as to whether the employee has crossed the line depends on several factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. [footnote omitted] *Atlantic Steel Co.*, 245 NLRB 814 (1979); see also *Felix Industries, Inc.*, 331 NLRB No 12 (2000) and *Health Care & Retirement Corp.*, 306 NLRB 63, 65 (1992).

Here, although Respondent committed serious unfair labor practices, it did so after Ms. Lozania's confrontation with Ms. Garcia. Consequently, unfair labor practices cannot have goaded Ms. Lozania. Ms. Lozania's unprovoked physical assault in pushing Ms. Garcia away constituted open insubordination to a supervisor, which is serious misconduct and which cost her the protection of the Act. Notwithstanding the misconduct, it remains to determine whether Respondent was motivated by union animus in its discharge of Ms. Lozania,

In resolving the question of Respondent's motivation, I follow the Board's analytical guidelines in *Wright Line*.<sup>51</sup> If the General Counsel's evidence supports a reasonable inference that protected concerted activity was a catalyzing factor in Respondent's discharge of Ms. Lozania, he has made a prima facie showing of unlawful conduct.<sup>52</sup> The burden of proof then shifts to Respondent to establish persuasively by a preponderance of the evidence that it

<sup>50</sup> Under *Burnup & Sims*, supra, it is not sufficient for Respondent to show a good faith belief the misconduct occurred, as discipline pursuant to a mistaken belief of misconduct in the course of protected activity violates Section 8(a)(1) of the Act.

<sup>51</sup> 251 NLRB 1083 (1980), enf'd. 662 F. 2d 899 (1<sup>st</sup> Cir. 1981), cert. Denied 455 U.S. 989 (1982).

<sup>52</sup> "The General Counsel must establish four elements by a preponderance of the evidence. First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove that the respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a motivational link, or nexus, between the employee's protected activity and the adverse employment action. [citation omitted]." *American Gardens Management Company*, 338 NLRB No. 76 at slip op. 2 (2002).

would have made the same decision, even in the absence of union activity.<sup>53</sup> *Avondale Industries, Inc.*, 329 NLRB 1064 (1999); *T&J Trucking Co.*, 316 NLRB 771 (1995). Respondent was well aware of Ms. Lozania's prominent role in the demonstration. It is also clear Respondent bore significant animosity toward employees who participated in the demonstration. Respondent unlawfully refused to reinstate and discharged employees who engaged in a work stoppage to support the demonstration, and Mr. Lomax informed employees of his chagrin at employees' participation in the protected activity. Finally, Respondent disciplined Ms. Lozania for conduct connected with the protected activity. In these circumstances, I conclude the General Counsel has made "an initial 'showing sufficient to support the inference that protected conduct was a motivating factor'" in Respondent's decision to terminate Ms. Lozania. *American Gardens Management Company*, 338 NLRB No. 76 at slip op. 2 (2002). The burden of proof therefore shifts to Respondent to show that Ms. Lozania's discharge would have (not just could have) occurred even in the absence of her participation in the demonstration. *Avondale Industries, Inc.*, supra at 1066.

In assessing Respondent's evidence of lawful purpose in discharging Ms. Lozania, I recognize the fact that an employer may desire to retaliate against employees or to curtail union activities does not, of itself, establish the illegality of a discharge. If an employee provides an employer with sufficient cause for dismissal by engaging in conduct that would, in any event, have resulted in termination, the fact the employer welcomes the opportunity does not render the discharge unlawful. *Avondale Industries, Inc.*, supra; *Klate Holt Company*, 161 NLRB 1606, 1612 (1966). Further, it is well established the Board "cannot substitute its judgment for that of the employer and decide what constitutes appropriate discipline." *Detroit Paneling Systems, Inc.*, 330 NLRB 1170, 1171 fn. 6 (2000) and cases cited therein. Nonetheless, the Board's role is to ascertain whether an employer's proffered reasons for disciplinary action are the actual ones. *Ibid*

Here, Ms. Lozania in her conduct toward Ms. Garcia, contravened Respondent's zero tolerance of violence policy. There is no question Respondent could reasonably have discharged her for such conduct. Whether the evidence supports a finding that Respondent actually did so depends, largely, on how it treated similarly circumstanced employees who had not engaged in prounion activities, that is, whether it disparately disciplined Ms. Lozania. Counsel for the General Counsel attempted to provide evidence of disparate treatment by comparing Ms. Garcia's bumping into a child at the ballot tally without consequent discipline to Ms. Lozania's conduct. I have found the comparison inapt; Ms. Garcia's conduct was neither intentional nor insubordinate, which Ms. Lozania's was and which, moreover, was directed toward a supervisor. Respondent furnished evidence of employees who were discharged for acts of violence toward other employees. I conclude Respondent regularly enforced its policy of zero tolerance for violence and was justified in regarding physical misconduct toward a supervisor as falling within the prohibitions of that policy. Accordingly, I conclude Respondent met its burden of showing Ms. Lozania's discharge would have occurred even in the absence of her participation in the demonstration. Respondent did not, therefore, violate Section 8(a)(3) of the Act by discharging Ms. Lozania.

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<sup>53</sup> A "preponderance" of evidence means that the proffered evidence must be sufficient to permit the conclusion that the proposed finding is more probable than not. McCormick Evidence, at 676-677 (1<sup>st</sup> ed. 1954).

### C. Alleged Violations of Section 8(a)(5) of the Act

I have earlier concluded that Respondent's installation of a swamp cooler, replacement of three water fountains, substitution of new for used protective gloves, and provision of Gatorade or similar drink during the summer did not violate Section 8(a)(1) of the Act. As I have concluded below that as of May 1, Respondent was obligated to recognize and bargain with the Union, it is left to determine whether these changes violate Section 8(a)(5) of the Act.

The General Counsel alleges that, after the establishment of its bargaining obligation, Respondent made the above unilateral changes that affected unit working conditions without notice to or bargaining with the Union. There is no dispute that changes occurred without notice to the Union. The question is whether the changes were material, substantial, and significant. It does not matter that the changes were salubrious. A change need not have a negative impact on terms and conditions of employment to be substantial and significant. Changes that improve employee conditions are still subject to the same bargaining obligations as adverse changes. *Wightman Center*, 301 NLRB 573, 575 (1991.) However, the General Counsel must show the changes significantly affected employees. *The Fresno Bee*, 339 NLRB No. 158, slip op. 3 (2003) (change in payroll period). The changes here did not alter or impact job functions, duties, requirements, benefits, wages, hours, or tenure. Cf. *Northside Center for Child Development*, 310 NLRB 105 (1993). The Board has found neither a new timer system nor a classification change that resulted in a slight pay increase to constitute material or substantial changes. *Litton Systems*, 300 NLRB 324 (1990); *Alamo Cement Co.*, 277 NLRB 1031 (1985); see also *Civil Service Employees' Association*, 311 NLRB 6, fn 2 (1993) (requirement that employees carry beepers not a material change). Moreover, the change in glove distribution had, by credible accounts, been decided and perhaps even instituted prior to the bargaining obligation. As to the increased allotment of Gatorade, so minor an adjustment in an already established practice cannot be material. *Litton Systems*, supra. I conclude, therefore, the changes made herein were neither material nor substantial, and Respondent did not thereby violate Section 8(a)(5) of the Act.

### D. Bargaining Order as Remedy

#### 1. The Appropriate Unit

The parties herein entered into a Stipulated Election Agreement that included LRAs in the appropriate unit. The General Counsel and Charging Party contend the agreement should not be given effect. They assert the Charging Party, through no fault of its own, did not have a clear understanding of the duties and work locations of the LRAs, that the stipulation regarding the unit is ambiguous on its face, and that it would be inequitable to bind the Charging Party to it. I agree.

The Board will refuse to allow relitigation of unit appropriateness where the intent behind the parties' stipulation is clear and unambiguous, even if the stipulation result differs from that which the Board would reach. *South Coast Hospice*, 333 NLRB 198 (2001); *Hampton Inn Suites*, 331 NLRB 238, 239 (2000); *Otis Hospital*, 219 NLRB 164, 165 (1975).<sup>54</sup> As stated by the Board, "The initial question is 'whether the intent of the parties is unambiguously manifested in the unit stipulation.' *Southwest Gas Corp.*, 305 NLRB 542, fn. 6 (1991). If the objective intent of the parties is manifested, the Board gives effect to the agreement. [Citations omitted]." *G & K Services, Inc.*, 340 NLRB No. 103, at slip op. 2 (2003). See also *Genesis Health Ventures of West Virginia, L.P.*, 326 NLRB 1208 (1998) ("Where the parties' intent is

<sup>54</sup> The Regional Director is also bound to such a stipulation. *T&L Leasing*, 318 NLRB 324, fn. 6 (1995).

clear and does not contravene any statutory provision or Board policy, the Board holds the parties to their agreement. [Citation omitted];") *Laidlaw Transit, Inc.*, 322 NLRB 895 (1997) (the Board will not examine extrinsic evidence to determine parties' intent if the unit description is in clear and unambiguous terms.)<sup>55</sup>

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Here, an ambiguity exists in the unit description. The stipulation, which specifically includes LRAs in the unit, also states unit employees are those "employed by the Employer, at its laundry facility located at 4445 South 36<sup>th</sup> Street, Phoenix, Arizona." The LRAs work in various area hospitals and only rarely appear at the plant and never perform work duties there. Ms. Meredith credibly testified the Charging Party assumed the location designation of the stipulation limited the unit to employees actually performing work at that address. After Respondent sought specific inclusion of the LRAs in the unit stipulation, Ms. Meredith, who never directly discussed unit inclusions with Respondent's representatives, told the Board Agent acting as intermediary she had no objection as long as the LRAs worked in the plant. At all times, therefore, there existed an ambiguity in the language of the stipulation, which included LRAs working away from the plant while at the same time limiting the unit to employees who worked at the plant. Thus, the stipulation did not reflect the intent of the Charging Party.

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If an ambiguity exists between intent and stipulation, the Board applies "community of interest" principles to determine whether disputed employees belong in the unit. *Genesis Health Ventures of West Virginia, L.P.*, supra. The community of interest test requires determination of whether a mutuality of interests in wages, hours, and working conditions exists among the employees involved. *M.B. Sturgis, Inc.*, 331 NLRB 1298, 1305 (2000) and cases cited therein. The Board has stated, "Under Section 9(b) of our statute, a group of an employer's employees working side by side at the same facility, under the same supervision, and under common working conditions, is likely to share a sufficient community of interest to constitute an appropriate unit [citations omitted]." *Id.*.

Factors considered by the Board in determining a lack of community of interest include:

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[A] difference in method of wages or compensation; different hours of work; different employment benefits; separate supervision; the degree of dissimilar qualifications, training and skills; differences in job functions and amount of working time spent away from the employment or plant situs ... the infrequency or lack of contact with other employees; lack of integration with the work functions of other employees or interchange with them; and history of bargaining.<sup>56</sup>

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Here the LRAs and plant employees do not work side by side, sharing supervision and common working conditions, and substantial distinctions exist between the work duties and backgrounds of the LRAs and the plant employees. The LRAs are geographically separated from the plant employees, which tends to create a separate and distinct community of interest. *Judge & Dolph, Ltd.*, 333 NLRB 175, 181 (2001). The LRAs report to the plant only for biweekly training meetings generally held separate from plant employees and have essentially no contact with plant employees in the performance of their job duties, except for delivery drivers who are themselves excluded from the unit. The LRAs are supervised separately from plant employees and, unlike plant employees, must be able to communicate in English, do simple math, and

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<sup>55</sup> Counsel for the General Counsel presents a colorable argument that the stipulated unit description is unambiguous, that it permits the inclusion of LRAs, but only those who physically work in the plant. However, since no such plant LRAs exist retrospectively, presently, or prospectively, adopting such an argument would avoid the key issue.

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<sup>56</sup> *Home Depot USA*, 331 NLRB 1289, 1290 (2000).

pass a criminal background check. There is no permanent or temporary interchange between plant employees and LRAs and little similarity of skills, duties, and working conditions.

5 It is clear the LRAs lack a sufficient community of interest with Respondent's plant employees to justify their inclusion in the bargaining unit. Accordingly, I find the appropriate unit of employees for purposes of collective bargaining is that set forth in the complaint:

10 All full-time and regular part-time production employees, seamstresses, laundry workers, maintenance (janitors), stock workers I, house keeping attendants I, supervisors I (lead/hourly), and shipping and receiving employees, employed by the Employer, at its laundry facility located at 4445 South 36<sup>th</sup> Street, Phoenix, Arizona; excluding all other employees, linen room attendants, office clericals, mechanics, maintenance mechanics, engineers, route drivers, drivers I, confidential employees, guards and supervisors as defined in the Act.

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2. Majority Status of the Union

Following the Board election on May 29, the Tally of Ballots, in pertinent part, showed the following:

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Approximate number of eligible voters	224
Number of void ballots	0
Number of votes cast for Union	76
Number of votes cast against the Union	117
Number of challenged ballots	19

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30 At the hearing, the parties agreed to certain deletions from the Excelsior list used in the election. With those deletions, the number of eligible voters stands at 220. The parties disagree on whether 14 LRAs and employee Leslie Nieves, hired May 1, are appropriately counted as eligible voters. As set forth above, I have concluded the LRAs are not appropriately included in the unit, and therefore, they are not eligible voters. Without their inclusion, the number of eligible voters as of May 1 numbered 206.<sup>57</sup> In order to prove majority support as of May 1, the date Respondent committed its most egregious unfair labor practices, the evidence must show the Union possessed valid authorization cards from 104 employees at that time.

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Union authorization cards provided to employees during the Union's solicitation of employee signatures read in pertinent part:

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I hereby accept membership in the [Union] and authorize [the Union] to represent me in negotiations with my employer about wages, hours, and all other conditions of employment.

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<sup>57</sup> I do not find it necessary to determine the status of Leslie Nieves.

Except for the cards of Guillermo Morales and Benita Sanchez, all union authorization cards submitted into evidence were dated between April 24 and April 30 inclusive (the card signing period). I find all cards, including those of Guillermo Morales and Benita Sanchez, to have been signed during that period.<sup>58</sup> At the hearing, the following employees identified their signatures on union authorization cards:

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Alvarado, Roberto	Lizarraga, David
Alvarez, Leticia	Lozania, Carmen
Ayala, Susano,	Mena, Francisca Roa
Caranza, Anamaria	Moreno, Monica
Espinosa, Elena	Pena, Yolanda Dominguez
Gaitan, Miguel	Ramirez, Maria A. (Gomez)
Gonzalez, Sandra	Zarate, Jose Jesus
Hernandez, Emilia	

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At the request of Counsel for the General Counsel, I compared original union authorization card signatures to exemplars furnished by Respondent.<sup>59</sup> Based on my comparisons, I found the following signatures to be authentic:

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Avena, Isabel	Martinez, Maria de le Paz
Alvarado, Antonio	Mateo, Modesta
Beltran, Gloria	Mendoza, Maria Garcia
Casillas, Berta	Mitchell, Allen
Casteneda, Maria	Mitchell, Trent
Castellanos, Juan Uribe	Munoz, Maria
Castillo, Maria O.	Ocasio, Amy
Chamale, Elmer	Perez, Gilberto
Chombo, Teofilo	Ramirez, Victor Nunez
Diaz, Ervey	Rodriguez, Joane
Duarte, Maria Sarabia	Rubin, Amelia
Duran, Jose	Saenz, Jesus R.
Enriquez, Iris	Saldana, Maria
Garcia, Jose Bonilla	Sanchez, Maria
Garcia, Julio	Sanchez, Max
Gordillo, Edith	Solis, Rosa
Hernandez, Delia Valdez	Strong, Angela
Hernandez, Miguelina	Tapia, Raquel
Lopez, Maria	Valdez, Filomena
Madrid, Raquel	Valenzuela, Maria
Martinez, Beatriz	Vasquez, Carmen
Martinez, Humberto	Ventura, Evangelina
Martinez, Jose	

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<sup>58</sup> The card of Guillermo Morales was undated and the card of Benita Sanchez was misdated May 25, but credible evidence establishes both were signed during the card signing period, appropriately validating the cards. *Mercedes Benz of Orland Park*, 333 NLRB 1017 (2001).

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<sup>59</sup> Respondent provided I-9 and W-4 forms signed by employees, which provide appropriate comparison. *Parts Depot, Inc.* 332 NLRB 670 (2000).

Based on its own comparison of union authorization card signatures to exemplars, Respondent stipulated the authenticity of the following signatures:

5	Cabral, Silveria De Flores, Marcelina Espinosa, Maria Luiza Galindo, Maria I. Gonzalez, Feliz Gonzalez, Yolanda	Nava, Juan Mayo Navarrette, Margarita Ojeda, Manuel <sup>60</sup> Osorio, Marta <sup>61</sup> Pinon, Moncerrat Poltillo, Patricia <sup>62</sup>
10	Guzman, Celsa Hernandez, Virginia Holquin, Graciela B. Ricardo, Leon Lizarraga, Basilia	Rodriguez, Maria C. Rodriguez, Salvador F. Ruiz, Audrey Solis, Juan Padilla Torrealba, Silvio Garcia
15	Maltos, Guadalupe Martinez, Alejandrina Moreno, Sergio Moreno, Sabino Haro	Torres, Ileana Valdez, Nancy Saldana Venegas, Maura

20 Respondent disputed the authenticity of the following union authorization card signatures:

25	Amadisca, Rosa Antonio, Vivanio F. Castro, Albert J. Daniels, Lupe Diaz, Giovanni Vladimir Gallegos, Maria Gonzalez, Sandra	Martinez, Renaldo Morales, Guillermo Pinon, Julia Rivera, Alberto Rodriguez-Cruz, Ameriz Romero, Jose Juan Sanchez, Benita
30	Lopez, Javier Alviro Manuel, Hector	Smith, Ronald Vasquez, Hilda Ibel

35 Union organizer, Ms. Pitkin, solicited employees of Respondent to sign union authorization cards during union campaign meetings, outside the plant, and during home visits to employees. She observed the signing of the following disputed cards<sup>63</sup>:

40	Amadisca, Rosa Castro, Albert J. Daniels, Lupe Diaz, Giovanni	Martinez, Renaldo Morales, Guillermo Pinon, Julia Rivera, Alberto
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45 <sup>60</sup> In his post-hearing brief, Counsel for the General Counsel, names this individual Manuel Valenzuela. The name and signature on the authorization card that is in evidence as GCX 116-18 are difficult to decipher. I accept Respondent's reading of the name,

<sup>61</sup> The parties stipulated the signature of Marta Osorio matches the exemplars in Respondent's records.

<sup>62</sup> This employee's authorization card bears the name Patricia Poltillo on the "Nombre [name]" line and Patricia Gordillo on the "Firma [signature]" line.

50 <sup>63</sup> Ms. Pitkin also observed the authorization card signatures of Jose B. Duran, Julio Garcia, Maria de la Paz Martinez, Trent Mitchell, Gilberto Perez, Felix Gonzalez, and David Lizarraga.

Gallegos, Maria  
 Gonzalez, Sandra  
 Lopez, Javier

Romero, Jose  
 Sanchez, Benita  
 Vasquez, Hilda

5 Union organizers, Edward Martinez, Marcos Lopez, and Alejandro Miranda, solicited employees of Respondent to sign union authorization cards during union campaign meetings, outside the plant, and during home visits to employees. Respectively, they observed the signing of the following disputed cards:

10 Antonio, Viviano and Rodriguez-Cruz, Amneriz  
 Manuel, Hector  
 Smith, Ronald

15 On April 27, after Mr. Briebiezca explained what a union was, Mr. Alvarado saw Monica Burruel sign a union authorization card.

Respondent argues the authorization cards of the following nine employees should be disregarded for the following reasons:

20 Hector Manual: Respondent asserts its records show no Hector Manual as an employee; Hector Manuel Alicea Sanchez was an employee, but since the card-signer is not that individual, the card must be disregarded. I note the address appearing on the card is essentially the same as that shown on the company records for Hector Manuel Alicea Sanchez.<sup>64</sup> I conclude Hector Manuel Alicea Sanchez merely shortened his full name when signing the card and that the card signed Hector Manual is that of an employee of Respondent in the appropriate unit. Accordingly, his card should be counted.

25  
 30 Benita Sanchez: Respondent urges the card be considered invalid as untimely. As noted above, I have determined Benita Sanchez signed during the card-signing period. Her card should be counted.

35 Amneriz Rodriguez-Cruz and Modesta Mateo: Respondent argues these two employees' authorization cards were invalidated by union threats and coercion to induce signing. Amneriz Rodriguez-Cruz initially testified union representatives promised her a quarterly \$50 raise if she signed and told her they would run her off her work if she did not sign because the Union was going to win. In cross-examination, she agreed a union representative had said the Union would "fight" for raises but would not be able to help employees if employees did not support the Union. She could not recall whether the individual who said "they" would run her off was a man or a woman, and she did not recall whether union organizers said if employees did not support the Union, the employer could run the union organizers off. Because of the testimonial inconsistencies, I cannot credit her testimony of being threatened or improperly induced to sign an authorization card. Modesta Mateo testified that when she asked what would happen if the Union did not win, union organizers said if she did not sign a card, she might lose her job. In cross-examination, she said a coworker, in the presence of union representatives, told her she should join the union to get better benefits. After hearing that, she completed her card. I find no credible threat in the alleged statements made to Modesta Mateo.

50 \_\_\_\_\_  
<sup>64</sup> The apartment number appears as #2 on the card and #1 on company records.

5 Maria Elena Gallegos, Sergio Moreno, Iliana Lopez Torrez: Respondent contends that in soliciting these employees' cards, the Union misrepresented that a majority of employees had already signed cards and thereby improperly induced card completion. Some courts have held that an authorization card can be invalidated by a  
 10 misrepresentation that an employee majority has already signed. See e.g., *NLRB v. Roney Plaza Apartments*, 597 F. 2d 1046, 1051 (5<sup>th</sup> Cir. 1979), cited by Respondent. The Board, however, has considered such statements do not invalidate authorization cards. *Mercedes Benz of Orland Park*, supra at 1030 ("everybody was joining" remark did not invalidate card); *Mid-East Consolidation Warehouse*, 247 NLRB 552, 560 (1980) ("Statement that 'everybody' had signed seems like little more than salesmanship or mild puffery.") Even assuming such misstatements would invalidate authorization cards, the evidence herein is too vague to permit me to conclude that misstatements were actually  
 15 made by any Union representatives or agents. Maria Elena Gallegos could not identify who had told her all coworkers had signed and in cross-examination said at the time she signed the card, "there were a lot of people there, and they just told me to sign that because my other co-workers had already signed." Sergio Moreno testified that he signed an authorization card on April 29 after someone called Miguel told him "some 41 people...had already signed, the majority." Miguel's statement may well have been an accurate representation since by the close of the following day, the Union had obtained  
 20 107 authorization cards, but in any event, he did not assert a majority of employees had signed since 41 was clearly not most of the employees. Iliana Lopez Torrez testified that union representatives told her to sign a card because "we were only lacking some of [her] coworkers and myself" and "to sign so that the Union could win." It is not clear from her testimony that union representatives misrepresented a majority had already signed. Rather, the statement could be understood, in the context of the Union's needing the  
 25 signatures so it could win, as a representation that only Iliana Lopez Torrez and some of her coworkers needed to sign cards to attain a majority. I conclude Respondent has not carried its burden of showing these cards to be invalid.

30 Marta Osorio, Alberto Rivera: Respondent contends the signatures on cards bearing these employees' names were not authenticated. Respondent is bound by its stipulation to authentication of Marta Osorio's signatures, and Ms. Pitkin observed the signature of Alberto Rivera. Therefore, I conclude these cards are valid.

35 The evidence establishes that 107 of Respondent's employees signed union authorization cards during the card-signing period ending April 30. That number is a clear majority of Respondent's eligible employees. As of May 1, the Union represented a majority of Respondent's employees in the appropriate unit for purposes of collective bargaining.

### 40 3. The Propriety of a Bargaining Order

45 In *Gissel Packing Co.*, 395 U.S. 575 (1969), The Supreme Court identified two categories of cases in which a bargaining order is appropriate: Category I cases are exceptional situations involving outrageous and pervasive unfair labor practices that traditional remedies cannot resolve and which make a fair election impossible. Category II cases involve unfair labor practices that are less extraordinary but that nonetheless have a tendency to undermine majority support and impede the election process. As such unfair labor practices render the possibility of a fair election slight, "employee sentiment once expressed through cards would...be better protected by a bargaining order." *Id.*, at 614-615.

50

The instant matter meets the standards for a *Gissel* category II bargaining order. Respondent refused to return Mr. Zarate, Ms. Ramirez, and Mr. Avena to work and discharged them for engaging in a protected work stoppage during the course of a protected employee demonstration. Respondent did so in such open and loudly conspicuous circumstances that only singularly reticent and reclusive unit employees could have remained unaware of Respondent's actions.<sup>65</sup> The discharge of visibly active union adherents has an especially pernicious effect on other employees. *National Propane Partners L.P.*, 337 NLRB 1006 (2002). Awareness of Respondent's motivation in refusing employment to Mr. Zarate, Ms. Ramirez, and Mr. Avena was general, and many employees discussed with union representatives their concern over coworkers having been "fired." The evidence thus establishes pervasive impact or dissemination of the unlawful conduct, and it is reasonable to infer the dramatic decline in employees' signing authorization cards thereafter was an immediate consequence of Respondent's overt unfair labor practices.

Respondent's coercive conduct did not end with its refusal to reinstate and its discharge of the three sorting employees. Mr. Lomax repeatedly informed employees he was affronted by the demonstration. Ms. Garcia improperly involved herself in authorization card revocation. Respondent issued an unlawful warning notice to Ms. Espinoza. In its election victory celebrations, Respondent sent a clear message to all employees that desirable employee teamwork was inconsistent with union adherence and implicitly threatened employees with reprisals if they continued to engage in union activities. Finally, Ms. Garcia directly coerced and restrained two employees from engaging in lawful union discussion with other employees. In these circumstances, Respondent's unfair labor practices are unremedied, their consequences are ongoing, the possibility of erasing their effects is slight, and the holding of a fair election is improbable. See *Joseph Stallone Electrical Contractors, Inc.*, 337 NLRB 1139 (2002); *Debbie Reynolds Hotel, Inc.*, 332 NLRB 466, at fn. 8 (2000).

#### 4. Respondent's Estoppel Defense

Respondent asserts that during the hearing, two union agents intentionally eavesdropped on attorney-client communications. Based on what the agents overheard, Counsel for the General Counsel amended the complaint. After presenting evidence on the amended allegations, Counsel for the General Counsel withdrew them, presumably as lacking merit. Respondent contends its due process rights were infringed upon by the Union's alleged misconduct and the General Counsel's acceptance of it, and that the General Counsel should therefore be estopped from seeking a bargaining order. Respondent provides no authority in support of its estoppel theory, and I can find none. Accordingly, I decline to estop the General Counsel from seeking a bargaining order.

#### E. Objections to the Election

Following the May 29 election, herein, the Union filed timely objections to conduct affecting the results of the election on June 4. The objections, in essential part, are as follows:

1. The conduct alleged in Case No. 28-CA-18708 [the original charge filed herein].
2. On the day of the election...employees had to go through the Employer's office in order to get to their work stations and the polling place...

<sup>65</sup> Respondent argues the terminations, even if unlawful, do not warrant a bargaining order because the terminations affected a "miniscule" part of the very large unit. Because of the open and notorious manner of the discharges, the argument is unpersuasive.

3. Within 24 hours of the election, employees received from the Employer [objectionable] literature...
4. On the day of the election, a large, anti-union banner was put up where it could be seen easily by the employees lined up for the polling place and near the official NLRB Notice of election...
5. Employees who were lined up to enter the polling place were requested by Employer representatives to leave the line to meet with management.
6. The Employer coerced employees into signing statements asserting that they signed union authorization cards because the Union forced them to do so.

The evidence adduced in support of the Union's objections is essentially the same evidence that supports unfair labor practices herein. The Board has consistently held that "conduct in violation of Section 8(a)(1) that occurs during the critical period prior to an election is 'a fortiori, conduct which interferes with the exercise of a free and untrammelled choice in an election.'" *IRIS U.S.A., Inc.*, 336 NLRB 1013, slip op. 1 (2001) citing *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962).<sup>66</sup>

Respondent argues that any misconduct was *de minimus* and did not affect the election. A narrow exception for minimal or isolated misconduct does exist, *Clark Equipment Co.*, 278 NLRB 498, 505 (1986). The exception does not apply here, as Respondent's unlawful conduct was widespread and substantial, involving job loss and coercive statements made to most unit employees.

In light of my finding of pervasive 8(a)(1) and (3) conduct addressed by the objections, I sustain the objections consistent with my findings herein. When the Board imposes a bargaining order, the election must be set aside and the petition for election dismissed. *Parts Depot Inc.*, 332 NLRB 670 (2000); *Great Atlantic & Pacific Tea Co.*, 230 NLRB 766 (1977); *Irving Air Chute Co., Marathon Division*, 149 NLRB 627 (1964). Accordingly, in consideration of the bargaining order, appropriate herein, I recommend the election be set aside and the Union's petition in Case 28-RC6175 be dismissed.

### Conclusions of Law

1. Respondent violated Section 8(a)(1) of the Act by
  - (a) Equating engaging in protected activity with disloyalty to Respondent.
  - (b) Informing employees wages would be frozen during any contract negotiations.
  - (c) Soliciting employees to revoke union authorization cards.
  - (d) Issuing a written warning notice to Elena Espinoza for conduct during the course of protected activity.
  - (e) Impliedly threatening employees with reprisals if they continued to engage in union or other protected activities.
  - (f) Orally reprimanding Elena Espinoza and Yolanda Pena for engaging in protected activity.

---

<sup>66</sup> The critical period during which the parties' conduct will be scrutinized for its impact on voters generally commences with the filing of the representation petition. *The National League of Professional Baseball Clubs, et al.*, 330 NLRB 670 (2000). The Union filed the instant petition on April 30.

2. Respondent violated Section 8(a)(3) and (1) of the Act on March 22 by discriminatorily refusing to reinstate and discharging striking employees, Isabel Avena, Maria Ramirez, and Jesus Zarate.

5 3. The following unit of Respondent's employees is appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

10 All full-time and regular part-time production employees, seamstresses, laundry workers, maintenance (janitors), stock workers I, house keeping attendants I, supervisors I (lead/hourly), and shipping and receiving employees, employed by the Employer, at its laundry facility located at 4445 South 36<sup>th</sup> Street, Phoenix, Arizona; excluding all other employees, linen room attendants, office clericals, mechanics, maintenance mechanics, engineers, route drivers, drivers I, confidential employees, guards and supervisors as defined in the Act.

15

4. The Union has been at all times since May 1, and is, the exclusive bargaining representative of the employees in said unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

20

5. The unfair labor practices set forth above affect commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

### 25 Remedy

Having found that Respondent has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

30

Respondent having discriminatorily refused to reinstate and discharged Isabel Avena, Maria Ramirez, and Jesus Zarate, it must offer them reinstatement insofar as it has not already done so and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The recommended Order will also provide that Respondent bargain in good faith with the Union as the exclusive collective bargaining representative of the above-described unit.

35

40 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>67</sup>

### ORDER

45

Respondent, The Commercial Linen Exchange, A Division of the Sodexho Corporation, its officers, agents, successors, and assigns, shall

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50 <sup>67</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

## 1. Cease and desist from

- 5 (a) Refusing to reinstate or discharging any employee for striking in support of the Union of Needletrades, Industrial and Textile Employees, AFL-CIO, CLC (UNITE), and to discourage employees from engaging in protected activities.
- (b) Telling employees they have been permanently replaced when they have not been.
- (c) Equating engaging in protected activity with disloyalty to Respondent.
- (d) Informing employees wages will be frozen during any contract negotiations.
- 10 (e) Soliciting employees to revoke union authorization cards.
- (f) Issuing a written warning notice to any employee for conduct during the course of protected activity.
- (g) Suggesting employees quit their jobs or seek other employment or otherwise impliedly threatening employees with reprisals if they continued to engage in union or other protected activities.
- 15 (h) Orally reprimanding or caution employees for discussing the union or otherwise engaging in protected activity.
- (i) Telling employees not to talk to other employees about the Union or working conditions while permitting them to talk about other non-work related matters.
- 20 (j) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

## 1. Take the following affirmative action necessary to effectuate the policies of the Act.

- 25 (a) On request, bargain with Union of Needletrades, Industrial and Textile Employees, AFL-CIO, CLC (UNITE) as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

30 All full-time and regular part-time production employees, seamstresses, laundry workers, maintenance (janitors), stock workers I, house keeping attendants I, supervisors I (lead/hourly), and shipping and receiving employees, employed by the Employer, at its laundry facility located at 4445 South 36<sup>th</sup> Street, Phoenix, Arizona; excluding all other employees, linen room attendants, office clericals, mechanics, maintenance mechanics, engineers, route drivers, drivers I, confidential employees, guards and supervisors as defined in the Act.

35

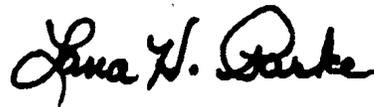
- (b) Within 14 days from the date of this Order, insofar as it has not already done so, offer Isabel Avena, Maria Ramirez, and Jesus Zarate full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.
- 40 (c) Make Isabel Avena, Maria Ramirez, and Jesus Zarate whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.
- 45 (d) Expunge from its files any reference to the unlawful discharges of Isabel Avena, Maria Ramirez, and Jesus Zarate and thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way.
- (e) Expunge from its files any reference to the unlawful discipline issued to Elena Espinoza and Yolanda Pena and thereafter notify them in writing that this has been done and that the discipline will not be used against them in any way.
- 50 (f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated

by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

- 5 (g) Within 14 days after service by the Region, post at its plant in Phoenix, Arizona, copies of the attached notice marked "Appendix."<sup>68</sup> Copies of the notice, on forms provided by the Regional Director for Region 28 after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places  
10 where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these  
15 proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since May 1, 2003.
- (h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

20 IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, at San Francisco, CA: March 3, 2004

25  


30 Lana H. Parke  
Administrative Law Judge

35  
40  
45  

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50 <sup>68</sup> If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

**APPENDIX  
NOTICE TO EMPLOYEES**

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

**FEDERAL LAW GIVES YOU THE RIGHT TO**

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities

**WE WILL NOT** do anything that interferes with these rights. More particularly,  
**WE WILL NOT** discharge or refuse to reinstate before we have permanently replaced any of you for supporting the Union of Needletrades, Industrial and Textile Employees, AFL-CIO, CLC (UNITE!) (the Union) or for engaging in a protected work stoppage.  
**WE WILL NOT** tell you that you have been permanently replaced when you have not been.  
**WE WILL NOT** say or imply you are disloyal if you support the Union.  
**WE WILL NOT** tell you your wages will be frozen during contract negotiations.  
**WE WILL NOT** ask or suggest that you revoke your union authorization cards.  
**WE WILL NOT** Issue a warning notice to any employee for engaging in any protected activity.  
**WE WILL NOT** suggest employees quit their jobs or seek other employment if they want to engage in union or other protected activities or to be represented by the Union.  
**WE WILL NOT** orally reprimand or caution employees for discussing the Union or engaging in other protected activity.  
**WE WILL NOT** tell you not to talk to other employees about the Union or your working conditions while permitting you to talk about other non-work related matters.  
**WE WILL NOT** In any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.

**WE WILL**, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

All full-time and regular part-time production employees, seamstresses, laundry workers, maintenance (janitors), stock workers I, house keeping attendants I, supervisors I (lead/hourly), and shipping and receiving employees, employed by the Employer, at its laundry facility located at 4445 South 36<sup>th</sup> Street, Phoenix, Arizona; excluding all other employees, linen room attendants, office clericals, mechanics, maintenance mechanics, engineers, route drivers, drivers I, confidential employees, guards and supervisors as defined in the Act.

**WE WILL**, within 14 days from the date of the Board's Order, insofar as we have not already done so, offer Isabel Avena, Maria Ramirez, and Jesus Zarate full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

**WE WILL** make Isabel Avena, Maria Ramirez, and Jesus Zarate whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

**WE WILL**, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Isabel Avena, Maria Ramirez, and Jesus Zarate and **WE WILL**, within 3 days thereafter, notify them in writing that this has been done and that the discharge will not be used against them in any way.

**WE WILL**, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discipline of Elena Espinoza and Yolanda Pena and **WE WILL**, within 3 days thereafter, notify them in writing that this has been done and that the discipline will not be used against them in any way.

**The Commercial Linen Exchange,  
A Division of the Sodexho Corporation**

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Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlrb.gov](http://www.nlrb.gov).

2600 North Central Avenue, Suite 1800, Phoenix, AZ 85004-3099

(602) 640-2160, Hours: 8:15 a.m. to 4:45 p.m.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (602) 640-2146.

UNITED STATES OF AMERICA  
 BEFORE THE NATIONAL LABOR RELATIONS BOARD  
 DIVISION OF JUDGES

THE COMMERCIAL LINEN EXCHANGE,  
 A DIVISION OF THE SODEXHO CORPORATION

and

Cases 28-CA-18708  
 28-CA-18807  
 28-CA-18948

UNION OF NEEDLETRADES, INDUSTRIAL  
 AND TEXTILE EMPLOYEES, AFL-CIO, CLC  
 (UNITE)

THE COMMERCIAL LINEN EXCHANGE,  
 A DIVISION OF THE SODEXHO CORPORATION

and

Case 28-RC-6175

UNION OF NEEDLETRADES, INDUSTRIAL  
 AND TEXTILE EMPLOYEES, AFL-CIO, CLC  
 (UNITE)

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